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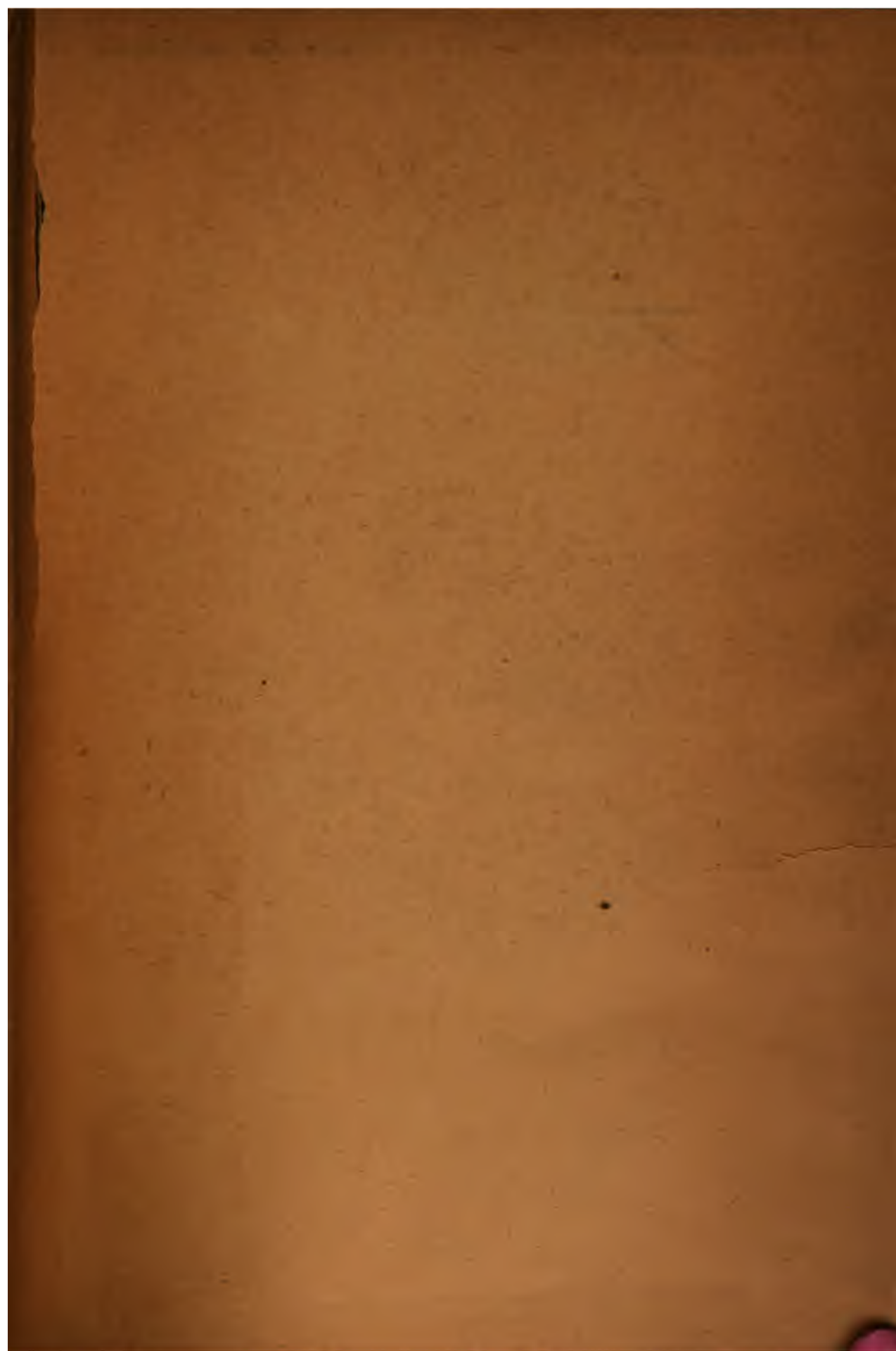
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FUR-SEAL ARBITRATION,

ORAL ARGUMENT

OF

56

JAMES C. CARTER, ESQ.,

ON BEHALF OF THE UNITED STATES

BEFORE THE

TRIBUNAL OF ARBITRATION

CONVENED AT PARIS

UNDER THE

PROVISIONS OF THE TREATY BETWEEN

THE UNITED STATES OF AMERICA

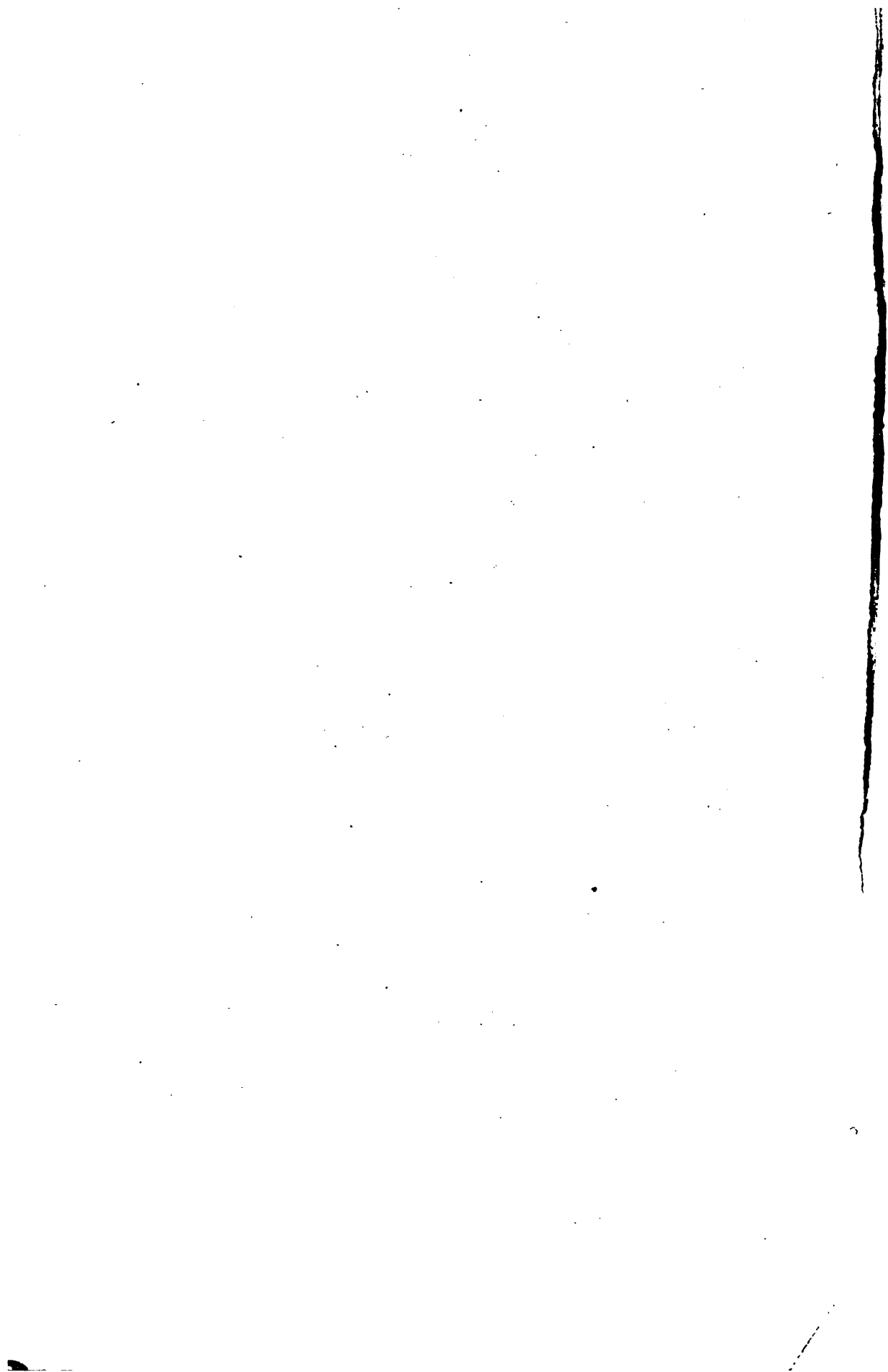
AND GREAT BRITAIN, CONCLUDED FEBRUARY 29, 1892.

PARIS

CHAMEROT & RENOARD, PRINTERS,

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1893



ORAL ARGUMENT
OF
JAMES C. CARTER, ESQ.

course, it will be part of your oral argument, and I think the gentlemen opposite will not have any reason for not receiving it.

Mr. Justice Harlan. Of course the American counsel ought to receive it now, in order that they may examine the appendices.

Sir Charles Russell. Certainly.

Mr. Phelps. We shall accept the proposal of my learned friend and will be very glad to receive copies.

Sir Charles Russell. The Tribunal will recollect that we made that offer at the time the document was originally produced.

The President. You did.

I will now read a second order bearing upon the question which was proposed, I think, by Mr. Phelps at the end of the last sitting, concerning the immediate hearing of the motion which had been lately proposed after the first motion had been argued :

It is ordered that the argument and consideration of the motion made by the United States of America on the 4th day of April, 1893, to strike out certain parts of the Counter Case and proofs of the Government of Great Britain be postponed until such time as may be hereafter indicated by the Tribunal.

Now, gentlemen we are ready to hear you speak upon the merits of the case, and the principal points of the case, and we are very anxious to begin, so that we may enter as soon as possible into the consideration of this important matter.

Mr. Carter. Mr. President.

Sir Charles Russell. I beg my friend's pardon. I desire to interrupt him for one moment.

It was arranged by my learned friend, Mr. Phelps, and myself, with the consent of my friend, Mr. Carter, that before the argument was opened it should be explained to the Tribunal the course that had been agreed upon as to the order of the argument of counsel, between my learned friends and myself, subject always to that arrangement meeting the approval of the Tribunal. It is necessary, I think, that I should make this word of explanation, because, as the Tribunal knows, the British Government is here complaining of the seizure of certain vessels under circumstances which, it alleges, do not justify that seizure, and, therefore, in the ordinary course of things it might be that it lay upon counsel of Great Britain, as the party originally complaining, to open the case; but inasmuch as the United States have admitted all the facts that it would be essential to prove to establish what in law is called a *prima facie* case; namely, in as much as the fact of the seizures has been admitted, and in as much as the United States Government has adopted the responsibility for those seizures, it would be apparent to the Tribunal that the *prima facie* case on the part of Great Britain would be of a merely formal kind, and therefore that the Uni-

ted States are in the position in which they are required to justify upon grounds consistent with the law the seizures of which complaint is here made. Under those circumstances it has been agreed between us that it would be a more regular, more convenient course for my learned friends, upon whom, in the way I have mentioned, the *onus probandi* lies, to open their case. It has been arranged that my learned friend Mr. Carter shall open, to be followed by my learned friend Mr. Coudert; that then the counsel for Great Britain, my friend Sir Richard Webster, and my friend Mr. Robinson, and myself, shall address the Tribunal; and that the ultimate reply shall rest with my learned friend Mr. Phelps; this arrangement being, of course, as the Tribunal will understand, and as I have intimated, subject to such views as the Tribunal may think fit to throw out and which their convenience may suggest as to any intermediate stages of the argument, and subject also, of course, to any necessity which may arise for re-arguing a particular point. Of course the Tribunal will have in its mind that we have made a statement which did not directly arise upon the motion disposed of as to the division of these questions. I do not intend to say anything at this moment upon that; but if there be upon the part of my learned friend an attempt in the argument to deal with the question of regulations coincidently with the previous questions, we shall have to submit to this Tribunal that that is not the course proper to be pursued.

I beg my learned friend's pardon for having interrupted him.

The President. The Tribunal is quite ready to approve of all the arrangements which the counsel find are suitable to their own convenience; and the arrangement as stated by Sir Charles Russell, if agreed upon by all the other counsel connected in the argument of this case, will be perfectly agreeable to the Tribunal.

I will only state one thing. It is that in the arrangement of the arguments that are to take place and the plan and ordering of the arguments that are to take place on either side, it would be for the convenience of the Tribunal if the learned counsel on either side were kind enough to keep separate the argument of the matters relating to the legal points and that of the matters relating to regulations; I mean to say to argue the points one after another as much as possible — to keep the five legal points separate from what concerns regulations; it would be more convenient for the Tribunal if these matters could be held separate in the consideration which the Tribunal will have of them, and, consequently, it would be more convenient also if the counsel were to act in accordance with this mode of procedure.

Now, Mr. Carter, the Tribunal is ready to hear you.

Mr. Carter. Mr. President : it would be evidence of insensibility on my part if in opening the discussion upon the important questions with which we are to deal I should fail to express my sense of the novelty, the importance, and the dignity of the case, and of the high character of the Tribunal which it is my privilege to address. You, Mr. President, in acknowledging the honor conferred upon you by your election as President, expressed in appropriate language those aspirations and hopes which are excited and gratified by so signal an attempt as this to remove all occasion for the employment of force between nations by the substitution of reason in the settlement of controversies. I beg to express my concurrence in those sentiments.

Nor should I omit a grateful recognition of the extreme kindness with which the agent and counsel on the part of the United States Government have been received. Not only has this magnificent building with all its appliances been freely offered for the deliberations of the Tribunal itself, but every aid and assistance which we as counsel could desire have been freely extended to us. We recognize in this a fine and generous hospitality, worthy of France and her great capital — the fair and beautiful capital of the world.

Mr. President, in reference to the statement which was made by my learned friend, Sir Charles Russell as to the order of proceeding which counsel have agreed to adopt, subject to the approval of the Tribunal, I have only this to say; we do not distinctly recognize that there is any special *onus probandi* resting upon the United States to substantiate its contention in reference to the disputed points. Those questions in our view are submitted to the Tribunal, and it is for the counsel on each side alike, equally to substantiate their contentions. Our own views in respect to the circumstances which make it proper that the affirmative should be taken by the United States are that they are the party seeking for the *affirmative action* of the Tribunal in their favor. I have no more to add in reference to that, and there is no essential point of difference between us.

Touching the suggestion which you, Mr. President, have just made respecting the importance of observing a separation between the questions, so to speak, of right and those which concern regulations, I shall endeavor to exactly comply with that recommendation. It will not be entirely possible altogether to separate those questions, but the *direct* discussion of them I shall keep entirely separate. Certain considerations concerning the question of regulations will arise and become material and important upon the argument of the question of property, but I shall only touch the question of regulations in the argument of the question of

property to the extent to which it seems to me that they may be material. The general and direct discussion of the question of regulations I shall endeavor carefully to separate from the rest of my argument.

In any discussion, Mr. President, of these important questions which the Tribunal is to determine it seems to me that it will be important in the first place that the Tribunal should have before it some sketch, as brief and concise as possible, of the subject matter of the controversy, of the particular occasions out of which the controversy grew and the successive steps through which it has from time to time passed, until it is has reached the stage at which we now find it. The learned arbitrators will, I think, thus be able to breathe the atmosphere, as it were, of the case; to approach the questions as the parties themselves approached them, and thus be able to better understand and appreciate the respective contentions of the two parties.

This, therefore, will be my apology, if apology were needed, for endeavoring to lay before you a sketch as concise as I shall be able to make it, of the controversy from the beginning, before proceeding to discuss the particular questions which have arisen.

The case has reference, as you are well aware, to the great fur-sealing interests which are centered in Bering Sea and in the waters which adjoin that sea. Those interests began to assume importance something like a century ago. During most of the 18th century, as all are aware, the efforts and ambitions of various European powers were directed towards the taking possession, the settlement, and the colonization of the temperate and tropical parts, so to speak, of the American continent. In those efforts, Russia seems to have taken a comparatively small part, if any part at all. Her enterprise and ambition were directed to these Northern seas, seas which border upon the coasts which in part she already possessed, the Siberian coast of Bering Sea. From that coast explorations were made by enterprising navigators belonging to that nation, until the whole of Bering Sea was discovered and the coasts on all its sides explored. The Aleutian Islands, forming its southern boundary were discovered and explored, and a part of what is called the Northwest Coast of the American continent south of the Alaskan Peninsula, and reaching south as far as the 54th or 50th degree of north latitude was also explored by Russian navigators and establishments were formed upon it in certain places. The great object of Russia in these enterprises and explorations was to reap for herself the sole profit and the sole benefit which could be derived from these remote and ice-bound regions; namely, that of the fur-bearing animals which inhabited them and which were gathered by the few natives, which

inhabited those regions. It was to obtain for herself the benefit of those animals and of the trade with the natives who were engaged in gathering them that constituted the main object of the original enterprises prosecuted by Russian navigators. They had at a very early period discovered what we call the Commander Islands on the western side of the Bering Sea, which were then as they are now, one of the principle resorts and breeding places of the fur-seals. They were carrying on a very large, or a considerable, industry in connection with those animals upon those islands.

Prior to the year 1787 one of their navigators, Capt. Pribilof, had observed very numerous bodies of fur-seals making their way northward through the passes of the Aleutian chain. Whither they were going he knew not, but, from his knowledge of the habits of the seals on the Commander Islands, he could not but suppose that there was somewhere north of the Aleutian chain in the Bering Sea another great breeding place and resort for these animals. He therefore, expended much labor in endeavoring to discover these resorts and in the year 1786, I think, on one of his voyages, he suddenly found himself in the presence of that tremendous roar — a roar almost like that of Niagara, it is said — which proceeds from the countless multitudes of animals upon the islands. He knew then that the object for which he was seeking had been attained; and waiting until the fog had lifted, he discovered himself in the presence of the islands to which his name was afterwards given. That was in 1786. Immediately following that discovery, sometimes individually and sometimes associated in companies, persons resorted to those islands, which were uninhabited, and made large captures of seals from them. This mode of taking them was by an indiscriminate slaughter of males and females; and of course it was not long before the disastrous effects of that method became apparent. They were greatly reduced in numbers, and at one or more times seemed to be upon the point almost of commercial extermination. By degrees they gradually learned what the laws of nature were in respect to the preservation of such a race of animals. They learned that they were highly polygamous in their nature, and that a certain draft could be taken from the superfluous males without sensibly depreciating the enormous numbers of the herd. Learning those facts, they by degrees established an industry upon the islands, removed a considerable number of the population of one or more of the Aleutian Islands to that place and kept them permanently there for the purpose of guarding the seals upon the islands, and taking at the time suitable for that purpose such a number of superfluous males as the knowledge they had acquired taught them could be safely taken.

Finally the system which they established grew step by step more regular and precise; and sometime, I think I may say, in the neighborhood of 1845, they had adopted a regular system which absolutely forbade the slaughter of females and confined the taking to young males under certain ages and limited the taking to a certain annual number. Under that reasonable system, conforming to natural laws, the existence of the herd was perpetuated and its numbers even largely increased; so at the time when it passed into the possession of the United States I think I may say it was true that the numbers of the herd were then equal to, if not greater than ever had been known since the Islands were first discovered. A similar system had been pursued by the Russians with similar effect upon the Commander Islands, possessions of their own on the western side of the Bering Sea.

The advantage of these results, so beneficial to Russia, so beneficial to mankind, may be more easily perceived by comparing them with the results which have flowed from the discovery of other homes of the fur-seal in other seas. It is well known that south of the equator and near the southern extremity of the South American continent there were other islands, Masafuera, Juan Fernandez, Falkland Islands and other places, where there were seals in almost equal multitudes. They were on uninhabited islands. They were in places where no protection could be extended against the capture of them. They were in places where no system of regulations limiting drafts which might be made upon them could be established, and the consequence was that in a few short years they were practically exterminated from every one of such haunts and have remained ever since practically, in a commercial point of view, exterminated, except in some few places over which the authority of some power has been exercised, and where regulations have been adopted more or less resembling those adopted upon the Pribilof Islands, and by which means the race has to a certain extent, although comparatively small, been preserved.

That was the condition of things when these islands passed into the possession of the United States under the treaty between that Government and Russia of 1867. At first, upon the acquisition by the United States Government, its authority was not immediately established, and consequently this herd of seals was laid open and exposed to the indiscriminate ravages of individuals who might be tempted thither by their hope of gaining a profit; and the consequence was that in the first year something like 240,000 seals were taken, and although some discrimination was attempted and an effort was made to confine the taking as far as possible to males only, yet those efforts were not in every respect successful. That

great draft thus irregularly and indiscriminately made upon them had undoubtedly an unfavorable effect; but the following year the United States succeeded in establishing its authority and at once re-adopted the system which had been up to that time pursued by Russia and which had been followed by such advantageous results.

In addition to that and for the purpose of further insuring the preservation of the herd, the United States Government resorted to national legislation. Acts were passed, the first of them as early as the year 1870, designed to protect the seal and other fur-bearing animals in Bering Sea, and the other possessions recently acquired from Russia. At a later period this statute — with others that had been subsequently passed — was revised, I think in the year 1873, when a general revision of the statutes of the United States was made. They were revised and made more stringent. It was made a criminal offence to kill any female seal; and the taking of any seals at all except in pursuance of the authority of the United States and under such regulations as it might adopt was made a criminal offence. Any vessel engaged in the taking of female seals in the waters of Alaska, according to the phrase used in the statute, was made liable to seizure and confiscation; and in this way it was hoped and expected that the fur-seals would be preserved in the future as completely as they had been in the past and that this herd would continue to be still as productive as before, and if possible made more productive. That system thus established by the United States in the year 1870 produced the same result as had followed the regulations established by Russia. The United States Government was enabled even to take a larger draft than Russia had prior to that time made upon the herd. Russia had limited herself at an early period to the taking of somewhere between 30 and 40 thousand seals annually, not solely perhaps for the reason that no more could be safely taken from the herd, but also from the reason, as I gather from the evidence, that at that time the demand for seals was not so great as to justify the putting of a larger number of skins upon the market.

At a later period of the occupation by Russia, her drafts were increased. At the time when the occupation was transferred to the United States, I think they amounted to somewhere between 50,000 and 70,000 annually. The United States, as I say, took 100,000 from the beginning, and continued to make those annual drafts of 100,000 down to the year 1890. That is a period of something like 19 years. The taking of this number of 100,000 did not, at first, appear to lead to any diminution in the numbers of the herd; and it was only in the year 1890, or a few years prior to that time, that a diminution in the numbers of the herd was

first observed. This diminution was at that time attributed to causes of which I shall presently say something.

Such was the industry established by the United States. It was a very beneficial industry — beneficial, in the first instance, to herself. She had adopted the practice of leasing these islands upon long terms — twenty years — to a private corporation; and those leases contained an obligation to pay a large annual sum in the shape of a revenue tax and a gross sum of some \$ 60,000 as rent. In addition to that, the lessees were required by the terms of the lease to pay to the United States Government a certain sum upon every seal captured by them, which of course resulted in the enjoyment by the United States of a still larger revenue. It was beneficial to the lessees, for it is to be supposed, and such is the fact, that they were enabled to make a profit notwithstanding the large sums they were compelled to pay to the United States Government upon the sealskins secured by them. But while it was profitable to the United States and profitable to the lessees, I may say — and this is what at all times I wish to impress upon this Tribunal — it was still more important and beneficial to the world at large. The fur-seal is one of the bounties of Providence, bestowed upon mankind in general, not for the benefit of this particular nation or that particular nation, but for the benefit of all; and all the benefit, of course, which mankind can get from that blessing is to secure the annual taking, use and enjoyment of the increase of the animal. That is all they can obtain from it. If they seek to obtain more, it is an abuse of the blessing, involving destruction, necessary destruction, and they soon deprive themselves of the benefit altogether.

This, therefore, was the benefit to mankind which was made possible, and which was enjoyed by mankind by this particular mode of dealing with the fur-seals which had been established and carried on upon the Pribilof Islands. Mankind got the benefit of the entire annual increase, and at the same time the stock was perpetually preserved and kept from any sort of peril; and in that benefit the citizens of the United States enjoyed, of course, no advantage over the rest of the world. The whole product of the herd was contributed at once to commerce, and through the instrumentality of commerce was carried all over the world to those who desired the sealskins, and those who desired sealskins, wherever they might be on the face of the globe, and whatever nation they might inhabit, got them upon the same terms upon which the citizens of the United States enjoyed them. This contribution of the annual product to the purposes of commerce, to be dealt with as commerce deals with one of its subjects, of course amounted substantially to a putting up of the whole annual pro-

duct of the seal at auction, and it was awarded to the highest bidder, wherever he might dwell.

The effect of this was, also, as we shall have occasion to see in the course of this discussion, to build up and maintain an important industry in Great Britain. It was there that the sealskins were manufactured and prepared for sale in the market, and thousands of people were engaged in that industry, many more, indeed, than were engaged in the industry of gathering the seals upon the Pribilof Islands. That particular benefit was secured to Great Britain in consequence of this industry.

In the few years preceding 1890, the Government of the United States was made aware of a peril to the industry which had thus been established, and which it was in the enjoyment of, a peril to the preservation of this race of seals, a peril not proceeding from what may be called natural causes, such as the killing by whales and other animals which prey upon the seals in the water, but a peril proceeding from the hand of man. It was found that the practice of pelagic sealing, which had for many years, and indeed from the earliest knowledge of these regions, been carried on to a very limited extent by the Indians who inhabited the coasts for the purpose of obtaining food for themselves and skins for their clothing, and which had made a limited draft upon the herds in that way — it was found that this practice was beginning to be extended so as to be carried on by whites, and in large vessels capable of proceeding long distances from the shore, of encountering the roughest weather, and of carrying boats and boatmen and hunters, armed with every appliance for taking and slaughtering the seals upon their passage through the seas. That practice began, I think, in the year 1876, but at first its dimensions were small. The vessels were fitted out mostly from a port in British Columbia, and confined their enterprise to the North Pacific Ocean, not entering Bering Sea at all; and their drafts upon the seals even in the North Pacific Ocean were at first extremely small, only a few thousands each year. But the business was found to be a profitable one, and, of course, as its profit was perceived, more and more were tempted to engage in it, and a larger and larger investment of capital was made in it. More and more vessels prosecuted the fishery in the North Pacific Ocean, and in 1883, for the first time, a vessel ventured to enter Bering Sea.

The learned Arbitrators will perceive that up to this time, during the whole of the Russian and the whole of the American occupation of these islands, there had been no such thing as pelagic sealing. Those two nations had enjoyed the full benefit of this property, the full benefit of these herds of seals, in as complete a degree as if they had been recongized as the sole proprietors of

them, and as if a title in them, not only while they were ashore and upon the breeding islands, but while they were absent upon their migrations, had been recognized in them during that whole period; or as if, there had been some regulation among the nations absolutely prohibiting all pelagic sealing. Up to the period when pelagic sealing began to be extended, as I have said, those advantages were exclusively enjoyed by Russia and the United States; and at first, as I have said, these enterprises did not extend into Bering Sea, but were carried on in the North Pacific Ocean, and south and east of the Aleutian chain.

Why Bering Sea was thus carefully abstained from, it may perhaps be difficult at the present time altogether to say. It may be for the reason that it was farther off, more difficult to reach. It may be for the reason that the pelagic sealers did not at first suppose that they had a right to enter Bering Sea and take the seals there, for it was well known that during the whole of the Russian occupation, Russia did assert for herself an exclusive right to all the products of that region of the globe; and it was also of course well known to all Governments, and to these pelagic sealers, that the United States had, when they acceded to the sovereignty over these islands, asserted a similar right, and made the practice of pelagic sealing, in Bering Sea, at least — perhaps farther, but in Bering Sea, at least—a criminal offence under their law. But from whatever cause, it was not until the year 1883 that any pelagic sealers ventured into Bering Sea. During that year a single vessel did enter there, took a large catch, was very successful, and was not called to any account; and this successful experiment was, of course, followed during the succeeding years by many repetitions of the same enterprise.

The extent to which pelagic sealing was thus carried on in Bering Sea, its probable consequences upon the herds which made their homes upon the Pribilof Islands, was not at first considered either by the United States, or by the lessees of the Islands. There was no means by which they could easily find out how many vessels made such excursions, and they did not at first seem to suppose that their interests were particularly threatened by it. Consequently, for the first two or three years no notice seems to have been taken of these enterprises by the Government of the United States, although she had laws made against them. But in 1886, this practice of taking seals at sea became so largely extended that it excited apprehensions for the safety of the herd; and it was perhaps thought at that time that there was already observable in the condition of the herd some damaging, destructive consequence of that pursuit of them by sea.

The attention of the United States having been called to the

practice, that Government determined to prevent it, and the first method to which it resorted was an enforcement of the laws upon her statute-book, which prohibited the practice and subjected all vessels engaged in it to seizure and confiscation. Instructions were accordingly given to the cruisers of the United States to suppress the practice, and to enforce those laws. The result was that in the year 1886 three British vessels and some American vessels were taken engaged in the pursuit illegally under the laws of the United States. They were carried in and condemned.

These seizures were in 1886. They were followed by protest on the part of Great Britain and that protest was made by a note addressed by Sir Lionel Sackville West to Mr. Bayard.

Sir Charles Russell. Give us the reference, Mr. Carter, please, as you go along.

Mr. Carter. It is on page 153, Vol. 1 of the Appendix to the American Case :

Sir L. S. Sackville West to Mr. Bayard.

WASHINGTON, September 27, 1886.

(Received September 28.)

SIR: I have the honor to inform you that Her Majesty's Government have received a telegram from the commander-in-chief of Her Majesty's naval forces on the Pacific station respecting the alleged seizure of the three British Columbian seal schooners by the United States revenue cruiser *Corwin*, and I am in consequence instructed to request to be furnished with any particulars which the United States Government may possess relative to this occurrence.

I have etc.,

L. S. SACKVILLE WEST.

That was the first note addressed by the British Government in consequence of these seizures and, as the learned Arbitrators will perceive, it called only for information. Mr. Bayard, who was then the American Secretary of State, did not immediately respond to this note. He could not give the requisite information. The locality as you will perceive, is exceedingly remote from Washington and communication with it could only be had on rare occasions. The opportunities for communication were very few, and therefore it was necessary, it was unavoidable, that a very considerable period of time would elapse before the United States could procure the information desired by the British Government, and inform it of the particulars. But, of course, at that time the United States Government was called upon to consider questions that would thus be likely to arise and to determine the course it would be best to pursue in reference to those questions; and they were called upon at that time — they perhaps had been considering it before, but at least at that time — to consider the exigency with which they were

thus confronted. What was it? Here had been an industry carried on by Russia before the acquisition by the United States for three-fourths of a century. It had been continued by the United States for twenty years, and continued with all the benefits to the United States and to the world which I have mentioned. It was threatened by this practice, which was rapidly extending itself, of pelagic sealing. What was pelagic sealing — for that was the thing which at first arrested the attention of the United States Government — what was pelagic sealing, and what were its obvious and its necessary consequences?

I must say a single word or two upon that point, although it will subsequently form a subject of more extended discussion; but right upon its face, pelagic sealing appeared to be, as it undoubtedly was, simply a method of destroying the race of seals.

Senator Morgan. Before you proceed to argue that, I would like to ask a question about the sealers in Bering Sea.

Mr. Carter. Certainly.

Senator Morgan. I find a table in this Appendix to the Case of the United States, which states that the "City of San Diego", a schooner, was seized by the American Government on July 17th, and it was an American ship.

Mr. Carter. Yes.

Senator Morgan. And then the Thornton, the Carolina, and the Onward were seized subsequently, on August first and second, and they were British. Is that the proper statement as you understand it?

Mr. Carter. I so understand it. The first seizures that were made were both American and British.

Senator Morgan. The first seizure that was made, according to this table — and that is the reason I call your attention to it — was an American ship, on July 17th, and then the next seizure was August 1st of British vessels.

Mr. Carter. Doubtless that is correct. I have not carried in my mind the fact — which is of course true — that the first seizure made was of an American vessel. It would appear to be so by the statement which was read by the learned Arbitrator.

I have said that pelagic sealing seemed to be simply destruction. It was destruction because it was not regulated. It was destruction because it proceeded in defiance of the obvious and well known laws which govern the protection and preservation of the race of seals. If it continued it seemed to the United States that it would as surely result in the destruction of seals as the indiscriminate slaughter of them on the islands of the southern ocean had resulted in the destruction of the herds in that quarter of the globe. They could not imagine that that could be right. They

could not imagine that it was right or proper for any nation, or any men anywhere upon the globe, on the sea or on the land, to sweep out of existence one of the bounties of Providence. They could not imagine that, when there was an industry established and in full operation and which had been for nearly a century, by which the whole benefit of this race of animals was secured, and permanently secured to man, without any peril to the stock, any man or any nation could rightfully, on the sea, or anywhere else, come in and by an indiscriminate and destructive pursuit of the animal take away that benefit forever from mankind. So it seemed to them, and so therefore they had no hesitation in giving the instructions which resulted in the seizure of these vessels; and those seizures resulted in the demand which I have just read.

I have said that there was no immediate answer to this call of the British Government, because owing to the remoteness of the situation the necessary information could not be procured. It was followed up, therefore very properly by Her Majesty's representative, and on the 21st of October, 1886 he addressed to Mr. Bayard another note, which will also be found on page 153 of the same volume, as follows :

Sir L. S. Sackville West to Mr. Bayard.

WASHINGTON, October 21, 1886.

(Received October 22.)

SIR : With reference to my note of the 27th ultimo, requesting to be furnished with any particulars which the United States Government may possess relative to the seizure in the North Pacific waters of three British Columbian seal schooners by the United States revenue cruiser *Corwin*, and to which I am without reply, I have the honor to inform you that I am now instructed by the Earl of Iddesleigh, Her Majesty's principal secretary of State for foreign affairs, to protest in the name of Her Majesty's Government against such seizure, and to reserve all rights to compensation.

I have, etc.,

L. S. SACKVILLE WEST.

The state of mind in which the representatives of the British Government appear to be at this time is represented by a note from the Earl of Iddesleigh to Sir Lionel Sackville West, which preceded the sending of the note which I have last mentioned. That was written on the 30th of October 1886. It begins with mentioning the fact that Her Majesty's Government was still awaiting the result of the application to the United States for information.

Sir Charles Russell. It did not precede the other. It is later.

Mr. Carter. Yes, it is a later note. I am much obliged to you. It is a later note, dated October 30th :

Earl of Iddesleigh to Sir L. S. Sackville West.

FOREIGN OFFICE, October 30, 1886.

SIR : Her Majesty's Government are still awaiting a report on the result of application which you were directed by my dispatch No. — 181, of the 9th ultimo, to make to the Government of the United States for information in regard to the reported seizure by the United States revenue cutter *Corwin* of three Canadian schooners while engaged in the pursuit of seals in Behring's Sea.

In the meanwhile further details in regard to these seizures have been sent to this country, and Her Majesty's Government now consider it incumbent on them to bring to the notice of the United States Government the facts of the case as they have reached them from British sources.

It seems the British Government had obtained some information which they had expected from the Government of the United States. This note proceeds thus :

It appears that three schooners, named respectively the *Carolina*, *Onward* and the *Thornton* were fitted out in Victoria, British Columbia, for the capture of seals in the waters of the Northern Pacific Ocean adjacent to Vancouver's Island, Queen Charlotte Islands and Alaska.

According to the deposition enclosed herewith from some of the officers and men these vessels were engaged in the capture of seals in the open sea, out of sight of land, when they were taken possession of, on or about the 1st of August last, by the United States Revenue cutter *Corwin* — the *Carolina* in latitude 55 degrees 50 minutes North, Longitude 168 degrees 53 minutes West; the *Onward* in latitude 50 degrees 52 minutes North and Longitude 167 degrees 55 minutes West; and the *Thornton* in about the same latitude and longitude.

They were all at a distance of more than sixty miles from the nearest land at the time of their seizure, and on being captured were towed by the *Corwin* to Ounalaska, where they are still detained. The crews of the *Carolina* and *Thornton*, with the exception of the Captain and one man of each vessel detained at that port, were, it appears, sent by the steamer *St. Paul* to San Francisco, Cal. and then turned adrift, while the crew of the *Onward* were kept at Ounalaska.

At the time of their seizure the *Carolina* had 686 seal-skins on board, the *Thornton* 404 and the *Onward* 900, and these were detained, and would appear to be still kept at Ounalaska, along with the schooners, by the United States authorities.

According to information given in the "Alaskan" a newspaper published at Sitka, in the territory of Alaska, and dated the 4th of September 1886, it is reported :

1) That the master and mate of the schooner *Thornton* were brought for trial before Judge Dawson in the United States District Court at Sitka, on the 30th of August last.

2) That the evidence given by the officers of the United States revenue cutter *Corwin* went to show that the *Thornton* was seized while in Bering Sea, about 60 or 70 miles Southeast of St. George Island, for the offence of hunting and killing seals within that part of Bering Sea, which (it was alleged by the Alaska newspaper), was ceded to the United States by Russia in 1867.

3) That the Judge in his charge to the jury, after quoting the first article of the treaty of the 30th of March, 1867, between Russia and the United States, in which the Western boundary of Alaska is defined, went on to say :

Then he gives an extract from the Judge's charge.

4) That the jury brought in a verdict of guilty against the prisoners, in accordance with which the Master of the *Thornton*, Hans Guttonson, was sentenced to imprisonment for thirty days and to pay a fine of \$ 500; and the mate of the *Thornton*, Norman, was sentenced to imprisonment for thirty days and to pay a fine of \$ 300; which terms of imprisonment are presumably being now carried into effect.

There is also reason to believe that the masters and mates of the *Onward* and *Carolina* have since been tried and sentenced to undergo penalties similar to those now being inflicted on the master and mate of the *Thornton*.

Sir Charles Russell. I would be glad, if it is not inconvenient to my friend, if he would read the grounds of the Judge's charge.

Mr. Carter. Certainly.

Sir Charles Russell. Beginning with the words " All the waters ".

Mr. Carter. This is the part quoted from the Judge's charge :

All the waters within the boundary set forth in this treaty to the Western end of the Aleutian Archipelago and chain of islands are to be considered as comprised within the waters of Alaska, and all the penalties prescribed by law against the killing of fur-bearing animals must, therefore, attach against any violation of law within the limits heretofore described. If, therefore, the jury believe from the evidence, that the defendants by themselves or in conjunction with others, did, on or about the time charged in the information, kill any otter, mink, martin, sable or fur-seal, or other fur-bearing animal or animals, on the shores of Alaska or in the Behring Sea east of 193 degrees of west longitude, the jury should find the defendants guilty.

That is the boundary in the Treaty — the western boundary named in the Treaty of cession to the United States from Russia.

The jury should find the defendants guilty, and assess their punishment separately at a fine of not less than \$ 200 nor more than \$ 1,000, or imprisonment not more than six months, or by both such fine (within the limits herein set forth) and imprisonment.

Lord Iddesleigh continues :

You will observe from the facts given above, that the authorities of the United States appear to lay claim to the sole sovereignty of that part of Behring Sea lying east of the westerly boundary of Alaska, as defined in the first article of the treaty concluded between the United States and Russia in 1867, by which Alaska was ceded to the United States, and which includes a stretch of sea extending in its widest part some 600 or 700 miles easterly (westerly?) from the mainland of Alaska.

In support of this claim, those authorities are alleged to have interfered with the peaceful and lawful occupation of Canadian citizens on the high seas, to have taken possession of their ships, to have subjected their property to forfeiture, and to have visited upon their persons the indignity of imprisonment.

Such proceedings, if correctly reported, would appear to have been in violation of the admitted principles of international law.

I request that you will, on the receipt of this dispatch, seek an interview with Mr. Bayard, and make him acquainted with the nature of the information with which Her Majesty's Government have been furnished respecting this matter, and state to him that they do not doubt that, if on inquiry it should prove to be correct, the Government of the United States will, with their well known sense of justice, at once admit the illegality of the proceedings resorted to against the British vessels and the British subjects above mentioned, and will cause reasonable reparation to be made for the wrongs to which they have been subjected and for the losses which they have sustained.

Should Mr. Bayard desire it, you are authorized to leave with him a copy of this dispatch.

I am, etc.,

IDDESLEIGH.

The learned Arbitrators will thus perceive the ground which the British Government were at first disposed to take, — and a copy of this dispatch was eventually communicated, no doubt, and therefore they did take this ground originally, — that this business of pelagic sealing was a peaceful and lawful occupation on the high seas, and that being such it could not be interfered with, nor could those who were engaged in it be taken and their property confiscated by the action of the American Government. The ground was, that this action of the American Government was taken at a greater distance than three miles from the shore, outside of our jurisdiction, and was therefore, unauthorized and unlawful. The grounds are two : First, that the occupation of pelagic sealing is a peaceful and lawful one; second, that outside, upon the high seas, the Government of the United States has no authority to arrest British vessels.

These requests from the representative of the Government of Great Britain upon Mr. Bayard for information were from time to time repeated during the delay which occurred, and which was made necessary, by the great remoteness of the scene of the difficulties from the city of Washington; and on the 4th of April 1887, the following note was addressed to Mr. Bayard, which will be found on page 159 of the first volume of the Appendix to the American Case :

Sir L. S. Sackville West to Mr. Bayard.

WASHINGTON, April 4, 1887.

(Received April 4.)

Sir : In view of the approaching fishing season in Behring Sea and the fitting out of vessels for fishing operations in those waters, Her Majesty's Go-

vernment have requested me to inquire whether the owners of such vessels may rely on being unmolested by the cruisers of the United States when not near land.

Her Majesty's Government also desires to know whether the documents referred to in your note of the 3d of February last connected with the seizure of certain British vessels beyond the three-mile limit and legal proceedings connected therewith have been received. And I have the honor therefore to request you to be good enough to enable me to reply to these inquiries on the part of Her Majesty's Government with as little delay as possible.

I have, etc.

L. S. SACKVILLE WEST.

In that note, as you will perceive, two points are made; first, that some instructions should be given to United States cruisers, so that British sealers should not be molested in the forthcoming season; and second, an inquiry whether the information desired had been received.

On the 12th of April, Mr. Bayard replies to that note as follows:

Mr. Bayard to Sir L. S. Sackville West.

DEPARTMENT OF STATE,
Washington, April 12, 1887.

SIR: I have the honor to acknowledge your note of the 4th instant relative to the fisheries in Behring Sea, and inquiring whether the documents referred to in my note of February 3, relating the cases of seizure in those waters of vessels charged with violating the laws of the United States regulating the killing of fur-seals, had been received.

The records of the judicial proceedings in the cases in the district court in Alaska referred to, were only received at this Department on Saturday last, and are now under examination.

The remoteness of the scene of the fur-seal fisheries and the special peculiarities of that industry have unavoidably delayed the Treasury officials in framing appropriate regulations and issuing orders to United States vessels to police the Alaskan waters for the protection of the fur seals from indiscriminate slaughter and consequent speedy extermination.

The laws of the United States in this behalf are contained in the Revised Statutes relating to Alaska, in sections 1956-1971, and have been in force for upwards of seventeen years; and prior to the seizures of last summer but a single infraction is known to have occurred, and that was promptly punished.

The question of instructions to Government vessels in regard to preventing the indiscriminate killing of fur seals is now being considered, and I will inform you at the earliest day possible what has been decided, so that British and other vessels visiting the waters in question can govern themselves accordingly.

I have, etc.

T. F. BAYARD.

That was followed by a note from the British Minister to Bayard, on July 8th:

SIR : With reference to your note of the 12th April, stating that the records of the judicial proceedings in the cases of the British vessels seized in the Behring Sea had been received, I have the honor to inform you that the Marquis of Salisbury has instructed me to request you to be good enough to furnish me with a copy of the same for the information of Her Majesty's Government.

Mr. Bayard addresses a note on the 11th of July to Sir Lionel Sackville West as follows :

SIR : Complying with the request contained in your note of the 8th instant, conveyed to me under the instructions of your Government, I have the honor to enclose you two printed copies of the judicial proceedings in the United States district court for the District of Alaska in the several cases of libel against the schooners *Onward*, *Carolina* and *Thornton*, for killing fur-seals in Alaskan waters.

The furnishing of these records to the representatives of the British Government, containing a full report of the proceedings in the district court of Alaska of course conveyed to the British Government full information of the grounds upon which vessels of that nation had been seized and carried in and condemned. Upon those records having been received by the British Government they were transmitted to Lord Salisbury, and upon examination of them, and upon acquiring full knowledge, as he then did, of the ground upon which the vessels had been seized and condemned, he addresses a note to the British Minister in Washington, of which a copy was to be furnished to the American Government. He reconsiders those grounds and states the attitude of the British Government in relation to them. That letter was written on the 10th of September, 1887. Something like a year had elapsed, the learned Arbitrators will perceive, from the time of the original seizures, which time had been occupied, or not occupied, in the endeavor to obtain this information. The Marquis of Salisbury writes :

FOREIGN OFFICE, September 10, 1887.

SIR : By a dispatch of the 30th October last (No. 214) the late Earl of Iddesleigh instructed you to call the attention of the United States Secretary of State to the circumstances of the seizure in Behring's Sea, by the American cruiser *Corwin*, of some British Canadian vessels; and his lordship directed you to state to Mr. Secretary Bayard that Her Majesty's Government felt sure that if the proceedings which were reported to have taken place in the United States district court were correctly described the United States Government would admit their illegality, and would cause reasonable reparation to be made to the British subjects for the wrongs to which they had been subjected and for the losses which they had sustained.

By a previous dispatch of the 9th September, you had been desired to ask to be furnished with any particulars which the United States Government might possess relative to the seizures in question; and on the 10th October you were instructed to enter a protest on behalf of Her Majesty's Government, and reserve for consideration hereafter all rights to compensation.

Nearly four months having elapsed without any definite information being furnished by the United States Government as to the grounds of the seizures, my predecessor instructed you, on the 8th of June [January?] last, to express to Mr. Bayard the concern of Her Majesty's Government at the delay, and to urge the immediate attention of the United States Government to the action of the American authorities in their treatment of these vessels and of their masters and crews.

On the 3d February Mr. Bayard informed you that the record of the judicial proceedings which he had called for was shortly expected to reach Washington, and that, without conclusion at that time of any questions which might be found to be involved in these cases of seizures, orders had been issued by the President's direction for the discontinuance of all pending proceedings, the discharge of the vessels referred to, and the release of all persons under arrest in connection therewith.

On the 4th of April, under instructions from me, you inquired of Mr. Bayard, in view of the approaching fishing season in Behring's Sea, whether the owners of British vessels might rely when not near land on being unmolested by the cruisers of the United States, and you again asked when the record of the judicial proceedings might be expected.

Mr. Bayard informed you, in reply (12th April), that the papers referred to had reached him and were being examined; that there had been unavoidable delay in framing appropriate regulations and issuing orders to the United States vessels to police the Alaskan waters; that the Revised Statutes relating to Alaska, sections 1956 and 1971, contained the laws of the United States in relation to the matter; and that the regulations were being considered, and he would inform you at the earliest day possible what had been decided, so that British and other vessels might govern themselves accordingly.

In view of the statements made by Mr. Bayard in his note of the 3d February, to which I have referred above, Her Majesty's Government assumed that, pending a conclusion of the discussion between the two Governments on the general question involved, no further similar seizures of British vessels would be made by order of the United States Government. They learn, however, from the contents of Mr. Bayard's note of the 13th ultimo, inclosed in your dispatch, No. 245, of the 15th ultimo, that such was not the meaning which he intended should be attached to his communication of the 3d February; and they deeply regret to find a proof of their misinterpretation of the intentions of the United States Government from an announcement recently received from the commander-in-chief of Her Majesty's naval forces in the Pacific, that several more British vessels engaged in seal hunting in Behring's Sea have been seized when a long distance from land by an American revenue vessel.

Her Majesty's Government have carefully considered the transcript record of the judicial proceedings in the United States district court in the several cases of the schooners *Carolina*, *Onward*, and *Thornton*, which were communicated to you in July, and were transmitted to me in your dispatch, No. 196, of the 12th of that month, and they can not find in them any justification for the condemnation of those vessels.

The libels of information allege that they were seized for killing fur seal within the limits of Alaska Territory, and in the waters thereof, in violation of section 1956 of the Revised Statutes of the United States; and the United States Naval Commander Abbey certainly affirmed that the vessels were seized within the waters of Alaska and the Territory of Alaska, but according to his own evidence, they were seized 75, 115, and 70 miles, respectively, south-southwest of St. George's Island.

It is not disputed, therefore, that the seizures in question were effected at

a distance from land far in excess of the limit of maritime jurisdiction, which any nation can claim by international law, and it is hardly necessary to add that such limit can not be enlarged by any municipal law.

The claim thus set up appears to be founded on the exceptional title said to have been conveyed to the United States by Russia at the time of the cession of the Alaska Territory.

The pretention which the Russian Government at one time put forward to exclusive jurisdiction over the whole of Behring Sea was, however, never admitted either by this country or the United States of America. On the contrary, it was strenuously resisted, as I shall presently show, and the American Government can hardly claim to have received from Russia rights which they declared to be inadmissible when asserted by the Russian Government. Nor does it appear from the text of the treaty of 1867 that Russia either intended or purported to make any such grant, for by Article I of that instrument Russia agreed to cede to the United States all the territory and dominion then possessed by Russia "on the continent of America and in the adjacent islands" within certain geographical limits described, and no mention was made of any exclusive right over the waters of Behring Sea.

Moreover, whatever rights as regards their respective subjects and citizens may be reciprocally conferred on the Russian and American Governments by treaty stipulation, the subjects of Her Majesty can not be thereby affected, except by special arrangement with this country.

With regard to the exclusive claims advanced in times past by Russia, I transmit to you documents communicated to the United States Congress in 1822, which show the view taken by the American Government of these pretensions.

In 1824 the Emperor of Russia had issued an edict establishing "rules for the limits of navigation and order of communication along the coast of the eastern Siberia, the northwestern coast of America, and the Aleutian, Kurile, and other islands."

The first section of the edict said :

The pursuit of commerce, whaling, and fishing, and of all other industry on all islands, ports, and gulfs, including the whole of the northwest coast of America, beginning from Behring Straits to the 51st degree of northern latitude; also from the Aleutian Islands to the eastern coast of Siberia, as well as along the Kurile Islands from Behring Straits to the south cape of the Island of Urup, viz, to the 45° 50' of northern latitude, is exclusively granted to Russian subjects.

And section 2 stated :

It is, therefore, prohibited to all foreign vessels, not only to land on the coast and islands belonging to Russia, as stated above, but also to approach them within less than 100 Italian miles. The transgressor's vessel is subject to confiscation, along with the whole cargo.

Lord Salisbury then proceeds : — (I desire to save reading as far as possible) — to state that copies of these regulations were communicated to the American Secretary of State, at that time Mr. John Quincy Adams, of great repute in his day, and great fame since, and that he asked the Russian Government for an explanation of the grounds upon which such provisions were based. The Russian Minister in his reply, dated the 28th of February, after explaining how Russia had acquired her possessions in North America, said :

I ought, in the last place, to request you to consider, Sir, that the Russian possessions in the Pacific Ocean extend on the northward coast of America from Behring's Strait to the 51st degree of north latitude, and on the opposite side of Asia and the islands adjacent from the same strait to the 45th degree. The extent of sea of which these possessions form the limits comprehends all the conditions which are ordinarily attached to shut seas ("*mers fermées*"), and the Russian Government might consequently judge itself authorized to exercise upon this sea the right of sovereignty, and especially that of entirely interdicting the entrance of foreigners; but it preferred only asserting its essential rights without taking advantage of localities.

That is the explanation given by the Russian Minister. Lord Salisbury continues :

On the 30th March Mr Adams replied to the explanations given by the Russian minister. He stated that, with respect to the pretension advanced in regard to territory, it must be considered not only with reference to the question of territorial rights, but also to that prohibition to the vessels of other nations, including those of the United States, to approach within 100 Italian miles of the coasts. That from the period of the existence of the United States as an independent nation their vessels had freely navigated these seas, the right to navigate them being a part of that independence; and with regard to the suggestion that "the Russian Government might have justified the exercise of sovereignty over the Pacific Ocean as a close sea," because it claims territory both on its American and Asiatic shores," it may suffice to say that the distance from shore to shore on this sea, in latitude 51° north, is not less than 90° of longitude or 4000 miles." Mr. Adams concluded as follows.

The President is persuaded that the citizens of this Union will remain unmolested in the prosecution of their lawful commerce, and that no effect will be given to an interdiction manifestly incompatible with their rights.

The convention between the United States of America and Russia of the 17th April, 1824, put an end to any further pretension on the part of Russia to restrict navigation or fishing in Behring Sea so far as American citizens were concerned; for by Article 1 it was agreed that in any part of the Great Ocean, commonly called the Pacific Ocean or South Sea, the respective citizens or subjects of the high contracting powers shall neither be disturbed nor restrained, either in navigation or fishing, saving certain restrictions which are not material to the present issue; and a similar stipulation in the convention between this country and Russia in the following year (15th May, 1825), put an end as regarded British subjects to the pretensions of Russia to which I have referred, and which had been entirely repudiated by Her Majesty's Government in correspondence with the Russian Government in 1821 and 1822, which for your more particular information I inclose herein.

Her Majesty's Government feel sure that, in view of the considerations which I have set forth in this dispatch, which you will communicate to Mr Bayard, the Government of the United States will admit that the seizure and condemnation of these British vessels and the imprisonment of their masters and crews were not warranted by the circumstances, and that they will be ready to afford reasonable compensation to those who have suffered in consequence, and issue immediate instructions to their naval officers which will prevent a recurrence of these regrettable incidents.

I am, etc.,

SALISBURY.

Lord Salisbury thus reiterated the position which had been taken, that the United States Government had no authority to enforce its municipal laws upon any part of the seas outside of the ordinary three mile limit; and in support of that position he referred to the action of the American Government in 1822 protesting against pretensions on the part of Russia to exercise what the United States Government then seemed to think were acts of sovereignty over the very seas; and his argument was, that the United States Government will hardly pretend now to exercise jurisdictional rights which, when asserted by Russia so many years ago, they protested against so vigorously. It will be observed that in this letter of Lord Salisbury, which it is important to consider, he makes no allusion to any supposed question of property. He makes no allusion to the industry carried on upon the Pribilof Islands, of guarding these seals, and preserving them for the uses of commerce. He makes no allusion to the question whether pelagic sealing is right or wrong in itself; but seems to consider that, whether right or wrong, and whether there is any property interest or not, the United States has no right to capture or confiscate a vessel upon the high seas because it is an attempt to enforce her municipal laws there. He puts himself upon the ground—not an unnatural one at all under the circumstances, having been shown the record of an American Tribunal of a libel upon a British vessel based upon an asserted violation of American law—that American municipal law which is the sole defence, as he supposes, of the taking of the vessels, cannot be enforced upon the high seas, and has no authority there, and he cites in favor of that position the prior action of the American Government.

At this time, information of the facts having reached both Governments, and the British Government having made a demand, and Lord Salisbury having put himself upon this ground, the question arose with the American Government what it was best to do. What was the situation? Here was its property, its industry, as it supposed, carried on for a century in the face of the whole world, and hitherto unmolested by the world—an industry beneficial to itself, and equally beneficial to the rest of mankind. That industry and the herd of seals upon which it rested were threatened with certain destruction, as it was viewed by the American Government, by this practice of pelagic sealing. Efforts had been made to arrest it by an enforcement of the American statute, which effort had been exerted against both American and British vessels. They were made, so far as Great Britain was concerned, with protest, on the ground that it was an exercise of authority which the United States did not have over the high seas. What was the United States Government to do under those cir-

cumstances? There was this complete and perfect property in the seals. There was this destructive character of pelagic sealing, a manifest, indisputable wrong, as it appeared to the Government of the United States, and a wrong, too destructive of one of its own interests, and therefore there must be an undoubted right somewhere and somehow to arrest the further progress of that wrong. The steps taken to do it had excited this protest upon the part of Great Britain, and undoubtedly did involve the exercise of an exceptional authority on the high seas.

The exigency might have been met in various ways. Mr. Bayard might have asserted the authority of the United States to repress this practice at once, and continued to assert that authority taking all the consequences. It is easy to see what that might have led to. Such a position once taken by the United States upon that question could not have been receded from. A position taken upon the other side, by Great Britain, could not perhaps have been receded from; and the result of that, as the cause of the controversy and the sources of irritation were present at hand at all times, would have been that the acts would be continually repeated, and would inevitably lead to hostilities. Another course was to endeavor to settle the controversy without a resort to any discussion of the respective rights of the Governments which were immediately concerned, and to settle it upon the assumption that whatever the rights were, upon the one side or the other, the effect of this practice of pelagic sealing to which the United States objected was so manifestly injurious, and the practice so manifestly wrong, that all Governments would probably assent to its repression, and thus the difficulty would be avoided.

Mr. Bayard did not believe, could not believe, that the practice of pelagic sealing was a right one. He did not believe, he could not believe, that any civilized nation would think it to be right. That was his view; but the course which statesmen take is, in most instances perhaps, a good deal governed by their particular personal character. Mr. Bayard, I need not say, was a statesman of the most enlightened character and the most humane views. No man had a more perfect abhorrence for war than he. No man had a lower estimate of force as a mode of adjusting international conflicts; and in respect to a question which, as he viewed it, there ought to be no difference among enlightened men, there would be no excuse on the part of the Government of the United States in so dealing with it as to make a resort to hostilities even probable. His course, therefore, at first was a conciliatory one. He determined to address the Governments not only of Great Britain, but the several Governments of the great maritime nations, put the question before them, and invite them to

consider the matter and come to an agreement in reference to this business of pelagic sealing — such an agreement as would prevent the extermination of the seals — without any resort to irritating discussions upon questions of right. That position of Mr. Bayard is represented by the first note of a deliberate character respecting this matter which he wrote. It is found on page 168 of the Volume to which I have been referring. The copy here is a note from him to Mr. Vignaud; but copies of it were sent to the American Ministers in Germany, Great Britain, Russia, Sweden and Norway and Japan.

Sir Charles Russell. I think a copy of this was not sent to Great Britain.

Mr. Carter. I think it was.

Sir Charles Russell. I think not.

Mr. Carter. That is my impression.

Mr. Foster. Yes.

Mr. Carter. I will read this note :

No 256.]

DEPARTMENT OF STATE,
Washington, August 19, 1887.

SIR : Recent occurrences have drawn the attention of this Department to the necessity of taking steps for the better protection of the fur-seal fisheries in Behring Sea.

Without raising any question as to the exceptional measures which the peculiar character of the property in question might justify this Government in taking, and without reference to any exceptional marine jurisdiction that might properly be claimed for that end, it is deemed advisable — and I am instructed by the President so to inform you — to attain the desired ends by international coöperation.

It is well known that the unregulated and indiscriminate killing of seals in many parts of the world has driven them from place to place, and, by breaking up their habitual resorts, has greatly reduced their number.

Under these circumstances, and in view of the common interest of all nations in preventing the indiscriminate destruction and consequent extermination of an animal which contributes so importantly to the commercial wealth and general use of mankind, you are hereby instructed to draw the attention of the Government to which you are accredited to the subject, and to invite it to enter into such an arrangement with the Government of the United States as will prevent the citizens of either country from killing seal in Behring Sea at such times and places, and by such methods as at present are pursued, and which threaten the speedy extermination of those animals and consequent serious loss to mankind.

The ministers of the United States to Germany, Sweden and Norway, Russia, Japan, and Great Britain have been each similarly addressed on the subject referred to in this instruction.

I am, etc.,

T. F. BAYARD.

1. Identic instructions were sent to the United States ministers to Germany. Great Britain, Japan, Russia and Sweden and Norway.

That was the attitude first taken by Mr. Bayard towards other nations. He refers, in the first place, to the peculiar character of the property in question; and in referring to the peculiar character of the property in question he means that it is an animal that passes part of its life on the land and part in the sea. He refers to the exceptional marine jurisdiction which the United States might claim to exercise for the purpose of protecting a piece of property so peculiar in its character. He expresses a desire to avoid discussion of those subjects, and he makes his appeal generally to those who are in charge of the interests of mankind to come to some international agreement by which an animal so important in its benefits as the seal is may be effectually preserved. That was the attitude taken by Mr. Bayard, characteristic of the man, conciliatory in his methods, and, as it seems to me, the one which an enlightened statesman should have taken under the circumstances.

The nations other than Great Britain who were thus addressed answered this note, I believe I am correct in saying, in rather a formal way; that they were not specially interested in the subject-matter of the controversy, but would take the suggestions into serious consideration and await such discussion as might be had. So far as Great Britain is concerned, I think I may say that the suggestions thus made by Mr. Bayard were communicated to Lord Salisbury by the American representative in England at that time, my associate Mr. Phelps, and were at once accepted by him in the spirit in which they were offered.

Senator Morgan. Mr. Carter, if you will allow me, I think that the diplomatic correspondence shows that Japan and Russia coincided with the proposition of the United States, and Norway and Sweden expressed their concurrence in the ideas presented in the note of Mr. Bayard, but said that that Government was not at present interested in the question, and suggested that the convention should be so framed as to admit other powers to join subsequently, if they saw proper.

Mr. Carter. I should have observed that Japan and Russia made a favorable response to these suggestions; but other nations not particularly interested answered, I think, in the way I suggested.

But what I had particularly in mind to impress upon the Tribunal was what I think will prove to be true; namely, that when these conciliatory suggestions were made to Lord Salisbury they were accepted by him in the spirit in which they were tendered. The first note which I shall read upon that point is that of Mr. Phelps to Mr. Bayard, which was dated in London, 12th November 1887; the letter of Mr. Bayard having been dated 19th of August. Mr. Phelps says :

(N^o 618).LEGATION OF THE UNITED STATES,
London, November 12, 1887. (Received November 22).

Sir: Referring to your instructions numbered 685, of August 19, 1887, I have now to say that owing to the absence from London of Lord Salisbury, secretary of state for foreign affairs, it has not been in my power to obtain his attention to the subject until yesterday.

I had then an interview with him, in which I proposed on the part of the Government of the United States that by mutual agreement of the two Governments a code of regulations should be adopted for the preservation of the seals in Behring Sea from destruction at improper times and by improper means by the citizens of either country; such agreement to be entirely irrespective of any questions of conflicting jurisdiction in those waters.

His lordship promptly acquiesced in this proposal on the part of Great Britain and suggested that I should obtain from my Government and submit to him a sketch of a system of regulations which would be adequate for the purpose.

I have therefore to request that I may be furnished as early as possible with a draft of such a code as in your judgment should be adopted.

I would suggest also that copies of it be furnished at the same time to the ministers of the United States in Germany, Sweden and Norway, Russia, France, and Japan, in order that it may be under consideration by the Governments of those countries. A mutual agreement between all the Governments interested may thus be reached at an early day.

I have, etc.,

E. J. PHELPS.

I assume from this that Mr. Phelps communicated the instructions he had received from Mr. Bayard, and that in that way the note of Mr. Bayard was communicated to the Government of Great Britain.

Sir Charles Russell. That is correct, substantially.

Mr. Carter. And the learned arbitrators will perceive from this that in carrying out the instructions which he had received from Mr. Bayard, Mr. Phelps proposed to Lord Salisbury the establishment of a code of regulations for the restriction of pelagic sealing by citizens of either country during certain times. The idea was a code of regulations establishing what was called a "close time"; and to that suggestion, which was designed to carry out Mr. Bayard's object of preserving the seals by international agreement, a prompt assent was given by Lord Salisbury. What was awaited, therefore, was the framing by the United States of a code of regulations sufficient to carry out the object in view. Mr. Phelps upon receiving that communication, presumably at least, — perhaps his letter may be somewhere printed but I do not know that it is — informed Mr. Bayard of this fact, and Mr. Bayard addresses this communication to him. This is from Mr. Bayard to Mr. Phelps and is found on page 175.

The President. Mr. Carter, I would suggest that before we begin this new question we might rest a while.

The Tribunal thereupon took a recess for a short time.
After re-assembling.

The President, said : Mr. Carter, will you proceed.

Mr. Carter. Mr. President, when the Tribunal rose for its recess, I was calling the attention of the learned Arbitrators to the course of the correspondence which arose in reference to the seizures of British vessels. I had stated the conciliatory action which Mr. Bayard, the American Secretary of State had chosen to take, the sending of communications by him to the American Ministers to the various maritime nations, and the response which had been received to the communication thus made from Lord Salisbury, the British Minister of Foreign Affairs. I had read, as showing that response, the note of Mr. Phelps to Mr. Bayard of November 12, 1887.

Mr. Bayard having received that communication, was evidently gratified at the prospect of an amicable solution of the difficulty, and he addresses this note to Mr. Phelps on the 25th of November, 1887 :

No 733.]

DEPARTMENT OF STATE,

Washington, November 25, 1887.

Sir : Your No, 618, of the 12th instant, stating the result of your interviews with Lord Salisbury on the subject of the seal fisheries in Behring Sea, is received.

The favorable response to our suggestion of mutually agreeing to a code of regulations is very satisfactory, and the subject will have immediate attention.

I am, etc.,

T. F. BAYARD.

You will remember that Mr. Phelps requested of Mr. Bayard a proposed Code of Regulations. On the 7th of February, 1888, Mr. Bayard again addresses Mr. Phelps, and in his communication gives the material elements of a proposed Code, and it is somewhat important to consider them. I read from the note :

Mr. Bayard to Mr. Phelps.

No 782.]

DEPARTMENT OF STATE,

Washington, February 7, 1888.

SIR : I have received your No 618, of the 12th of November last containing an account of your interview with Lord Salisbury of the preceding day, in which his lordship expressed acquiescence in my proposal of an agreement between the United States and Great Britain in regard to the adoption of concurrent regulations for the preservation of fur-seals in Behring Sea from extermination by destruction at improper seasons and by improper methods by the citizens of either country.

In response to his lordship's suggestion that this Government submit a sketch of a system of regulations for the purpose indicated, it may be expedient, before making a definite proposition, to describe some of the conditions of seal life; and for this purpose it is believed that a concise statement as to that part of the life of the seal which is spent in Behring Sea will be sufficient.

All those who have made a study of the seals in Behring Sea are agreed that, on an average, from five to six months, that is to say, from the middle or toward the end of spring till the middle or end of October, are spent by them in those waters in breeding and in rearing their young. During this time they have their rookeries on the islands of St. Paul and St. George, which constitute the Pribilof group and belong to the United States, and on the Commander Islands, which belong to Russia. But the number of animals resorting to the latter group is small in comparison with that resorting to the former. The rest of the year they are supposed to spend in the open sea south of the Aleutian Islands.

Their migration northward, which has been stated as taking place during the spring and till the middle of June, is made through the numerous passes in the long chain of the Aleutian Islands, above which the courses of their travel converge chiefly to the Pribilof group. During this migration the female seals are so advanced in pregnancy that they generally give birth to their young, which are commonly called pups, within two weeks after reaching the rookeries. Between the time of the birth of the pups and of the emigration of the seals from the islands in the autumn the females are occupied in suckling their young; and by far the largest part of the seals found at a distance from the islands in Behring Sea during the summer and early autumn are females in search of food, which is made doubly necessary to enable them to suckle their young as well as to support a condition of renewed pregnancy, which begins in a week or a little more after their delivery.

The male seals, or bulls, as they are commonly called, require little food while on the islands, where they remain guarding their harems, watching the rookeries, and sustaining existence on the large amount of blubber which they have secreted beneath their skins and which is gradually absorbed during the five or six succeeding months.

Moreover, it is impossible to distinguish the male from the female seals in the water, or pregnant females from those that are not so. When the animals are killed in the water with firearms many sink at once and are never recovered, and some authorities state that not more than one out of three of those so slaughtered is ever secured. This may, however, be an overestimate of the number lost.

It is thus apparent that to permit the destruction of the seals by the use of firearms, nets, or other mischievous means in Behring Sea would result in the speedy extermination of the race. There appears to be no difference of opinion on this subject among experts. And the fact is so clearly and forcibly stated in the report of the inspector of fisheries for British Columbia of the 31st of December, 1886, that I will quote therefrom the following pertinent passage :

There were killed this year, so far, from 40 000 to 50 000 fur-seals, which have been taken by schooners from San Francisco and Victoria. The greater number were killed in Behring Sea, and were nearly all cows or female seals. This enormous catch, with the increase which will take place when the vessels fitting up every year are ready, will I am afraid, soon deplete our fur-seal fishery, and it is a great pity that such a valuable industry could not in some way be protected. (Report of Thomas Mowat, inspector of fisheries for British Columbia; Sessional Papers, Vol. 15, No 16, p. 268; Ottawa, 1887.)

The only way of obviating the lamentable result above predicted appears to be by the United States, Great Britain, and other interested powers taking concerted action to prevent their citizens or subjects from killing fur-seals with firearms, or other destructive weapons, north of 50° of north latitude, and between 160° of longitude west and 170° of longitude east from Greenwich, during the period intervening between April 15 and November 1.

The limits thus described by Mr. Bayard, and which are, I believe, first described, are those between the 160th degree of longitude west and 170 of longitude east from Greenwich. Here is 170 of longitude (indicating on map) east, and here is 160 of longitude west. There is the 50th degree of latitude. It is, therefore, from this point 170 east to 160 west (indicating on map). All north of that parallel of 50 degrees of latitude, and 160 between there (indicating) and 170 there, was the proposed area of exclusion, thus including the whole of Behring Sea, substantially, and a considerable part of the North Pacific Ocean south of Behring Sea.

Sir Charles Russell. That will exclude, I think, the Commander Islands?

Mr. Carter. Apparently it would exclude the Commander Islands.

To prevent the killing within a marine belt of 40 or 50 miles from the islands during that period would be ineffectual as a preservative measure. This would clearly be so during the approach of the seals to the islands. And after their arrival there such a limit of protection would also be insufficient, since the rapid progress of the seals through the water enables them to go great distances from the islands in so short a time that it has been calculated that an ordinary seal could go to the Aleutian Islands and back, in all a distance of 360 or 400 miles, in less than two days.

On the Pribilof Islands themselves, where the killing is at present under the direction of the Alaska Commercial Company, which by the terms of its contract is not permitted to take over 100 000 skins a year, no females, pups, or old bulls are ever killed, and thus the breeding of the animals is not interfered with. The old bulls are the first to reach the islands, where they await the coming of the females. As the young bulls arrive they are driven away by the old bulls to the sandy part of the islands, by themselves. And these are the animals that are driven inland and there killed by clubbing, so that the skins are not perforated, and discrimination is exercised in each case.

That the extermination of the fur-seals must soon take place unless they are protected from destruction in Behring Sea is shown by the fate of the animal in other parts of the world, in the absence of concerted action among the nations interested for its preservation. Formerly many thousands of seals were obtained annually from the South Pacific Islands, and from the coasts of Chile and South Africa. They were also common in the Falkland Islands and the adjacent seas. But in those islands, where hundreds of thousands of skins were formerly obtained, there have been taken, according to best statistics, since 1880, less than 1 500 skins. In some places the indiscriminate slaughter, especially by use of firearms, has in a few years resulted in completely breaking up extensive rookeries.

At the present time it is estimated that out of an aggregate yearly yield of 185 000 seals from all parts of the globe, over 130 000, or more than two-thirds

are obtained from the rookeries on the American and Russian islands in Behring Sea. Of the remainder, the larger part are taken in Behring Sea, although such taking, at least on such a scale, in that quarter is a comparatively recent thing. But if the killing of the fur-seal there with firearms, nets, and other destructive implements were permitted, hunters would abandon other and exhausted places of pursuit for the more productive field of Behring Sea, where extermination of this valuable animal would also rapidly ensue.

It is manifestly for the interests of all nations that so deplorable a thing should not be allowed to occur. As has already been stated, on the Pribilof Islands this Government strictly limits the number of seals that may be killed under its own lease to an American company; and citizens of the United States have, during the past year, been arrested and ten American vessels seized for killing fur seals in Behring Sea.

England, however, has an especially great interest in this matter, in addition to that which she must feel in preventing the extermination of an animal which contributes so much to the gain and comfort of her people. Nearly all undressed fur-seal skins are sent to London, where they are dressed and dyed for the market, and where many of them are sold. It is stated that at least 10,000 people in that city find profitable employment in this work; far more than the total number of people engaged in hunting the fur-seal in every part of the world. At the Pribilof Islands it is believed that there are not more than 400 persons so engaged; at Commander Islands, not more than 300; in the Northwest coast fishery, not more than 525 Indian hunters and 100 whites; and in the Cape Horn fishery, not more than 400 persons, of whom perhaps 300 are Chileans. Great Britain, therefore, in cooperating with the United States to prevent the destruction of fur seals in Behring Sea would also be perpetuating an extensive and valuable industry in which her own citizens have the most lucrative share.

I inclose for your information copy of a memorandum on the fur-seal fisheries of the world, prepared by Mr. A. Howard Clark, in response to a request made by this Department to the U. S. Fish Commissioner. I inclose also, for your further information, copy of a letter to me, dated December 3d last, from Mr. Henry W. Elliott, who has spent much time in Alaska, engaged in the study of seal life, upon which he is well known as an authority. I desire to call your especial attention to what is said by Mr. Elliott in respect to the new method of catching the seals which nets.

As the subject of this dispatch is one of great importance and of immediate urgency, I will ask that you give it as early attention as possible.

I am, etc.,

T. F. BAYARD.

That was Mr. Bayard's number 782. Mr. Phelps acknowledges this letter on the 18th of February 1888, thus:

Mr. Phelps to Mr. Bayard.

N^o 690.]

LEGATION OF THE UNITED STATES,
London, February 18, 1888. (Received February 28.)

SIR: I received yesterday your instruction No 782, under date of February-7, relative to the Alaskan seal fisheries. I immediately addressed a note to Lord Salisbury, inclosing for his perusal one of the printed copies of the instruction, and requesting an appointment for an early interview on the subject.

I also sent a note to the Russian ambassador, and an interview with him is arranged for the 21st instant.

The whole matter will receive my immediate and thorough attention and I hope for a favorable result. Meanwhile I would ask your consideration of the manner in which you would propose to carry out the regulations of the fisheries that may be agreed upon by the countries interested, Would not legislation be necessary; and, if so, is there any hope of obtaining it on the part of Congress?

I have, etc.,

E. J. PHELPS.

Subsequently, on the 23th of February, he again addresses Mr. Bayard, and this is his note:

Mr. Phelps to Mr. Bayard.

[Extract.]

N° 692.]

LEGATION OF THE UNITED STATES,

London, February 25, 1888. (Received March 6.)

SIR: Referring to your instructions, numbered 782, of February 7, 1888, in reference to the Alaska seal fisheries, and to my reply thereto, numbered 690, of February 18, I have the honor to inform you that I have since had interviews on the subject with Lord Salisbury and with M. de Staal, the Russian ambassador.

Lord Salisbury assents to your proposition to establish, by mutual arrangement between the governments interested, a close time for fur seals, between April 15 and November 1, and between 160° of longitude west and 170° of longitude east, in the Behring Sea.

He will also join the United States Government in any preventive measures it may be thought best to adopt, by orders issued to the naval vessels in that region of the respective governments.

I have this morning telegraphed you for additional printed copies of instructions 782 for the use of Her Majesty's Government.

The Russian ambassador concurs, so far as his personal opinion is concerned, in the propriety of the proposed measures for the protection of the seals, and has promised to communicate at once with his Government in regard to it. I have furnished him with copies of instructions 782 for the use of his Government.

I have, etc.,

E. J. PHELPS.

The learned Arbitrators will perceive from Mr. Phelps' note that the proposed close time extending over the area between 170 east longitude and 160 west longitude, and beginning at the 50th parallel of latitude, and including everything north, was at once assented to, and that pelagic sealing within that area was to be prohibited between April 15th and November 1st.

Of course, I do not understand from this note that Mr. Phelps intimated that the agreement was absolutely final, so that it might be put in the form of a treaty or convention: but only that the proposition of Mr. Bayard containing that measure of restriction was at once assented to by Lord Salisbury without objection, although

further communications might be needful before the measure was put in the shape of a treaty; nor do I mean to intimate that Mr. Phelps states that the agreement was an absolute one, precluding any withdrawal from it.

Mr. Bayard again addresses Mr. Phelps on the 2nd of March, 1888, and in this communication he acknowledges the receipt, not of the last letter that I read, but of the one prior to that, of February 18, 1888 :

Mr. Bayard to Mr. Phelps.

N° 810.]

DEPARTMENT OF STATE,
Washington, March 2, 1888.

SIR : I have to acknowledge the receipt of your No 690, of the 18th ultimo, in relation to the Alaskan seal fisheries, and have pleasure in observing the promptitude with which the business has been conducted.

It is hoped that Lord Salisbury will give it favorable consideration, as there can be no doubt of the importance of preserving the seal fisheries in Behring Sea, and it is also desirable that this should be done by an arrangement between the governments interested, without the United States being called upon to consider what special measures of its own the exceptional character of the property in question might require it to take in case of the refusal of foreign powers to give their coöperation.

Whether legislation would be necessary to enable the United States and Great Britain to carry out measures for the protection of the seals would depend much upon the character of the regulations; but it is probable that legislation would be required.

The manner of protecting the seals would depend upon the kind of arrangement which Great Britain would be willing to make with the United States for the policing of the seas and for the trial of British subjects violating the regulations which the two Governments may agree upon for such protection. As it appears to this Government, the commerce carried on in and about Behring Sea is so limited in variety and extent that the present efforts of this Government to protect the seals need not be complicated by considerations which are of great importance in highways of commerce and render the interference by the officers of one Government with the merchant vessels of another on the high seas inadmissible. But even in regard to those parts of the globe where commerce is extensively carried on, the United States and Great Britain have, for a common purpose, abated in a measure their objection to such interference and agreed that it might be made by the naval vessels of either country.

Reference is made to the treaty concluded at Washington on the 7th of April, 1862, between the United States and Great Britain for the suppression of the slave trade, under which the joint policing of the seas by the naval vessels of the contracting parties was provided for. In this convention no limitation was imposed as to the part of the high seas of the world in which visitation and search of the merchant vessels of one of the contracting parties might be made by a naval vessel of the other party. In the present case, however, the range within which visitation and search would be required is so limited, and the commerce there carried on so insignificant, that it is scarcely thought necessary to refer to the slave-trade convention for a precedent, nor is it deemed necessary that the performance of police duty should be by the naval vessels of the contracting parties.

In regard to the trial of offenders for violation of the proposed regulations, provision might be made for such trial by handing over the alleged offender to the courts of his own country.

A precedent for such procedure is found in the treaty signed at the Hague on May 6, 1882, for regulating the police of the North Sea fisheries, a copy of which is inclosed.

I am, etc.,

T. F. BAYARD

The Arbitrators will see that so far the diplomatic correspondence has resulted in this; that the first proposal to Great Britain of concurrent regulations was acceded to by Lord Salisbury, and a draft of proposed regulations was requested by Mr. Phelps from Mr. Bayard, in order that he might more distinctly state the terms of the proposal to Lord Salisbury. Having obtained a draft of the proposed regulations, which provided for a close season over an area which I have already described, that was submitted to Lord Salisbury and met with his prompt assent. That, it will be perceived, made a "close period" between April 15, and November 1st.

It was shortly after this, and if I am correct in my recollection, on or about the 5th of April, 1888, that Mr. Phelps left London and went to the United States for a while, and the affairs of the mission in London were left in charge of Mr. White. There are some letters from Mr. White to Mr. Bayard which show the further progress of the negotiations. Mr. White, on the 7th of April, 1888, addresses Mr. Bayard. This is a telegram. Mr. White stated that on the following Thursday he was to meet Lord Salisbury and M. de Staal, etc :

Mr. White to Mr. Bayard.

[Telegram]

LEGATION OF THE UNITED STATES,
London, April 7, 1888. (Received April 7.)

Mr. White stated that on the following Thursday he was to meet Lord Salisbury and M. de Staal to discuss the question of the protection of the seals. On April 7 he had had an interview on the subject with M. de Staal, from whom he learned that the Russian Government wished to include in the proposed arrangement that part of Behring Sea in which the Commander Islands are situated, and also the sea of Okhotsk. Mr. White supposed that the United States would not object to this.

On the same day he addresses this letter to Mr. Bayard :

Mr. White to Mr. Bayard.

No. 720.]

LEGATION OF THE UNITED STATES,
London, April 7, 1888. (Received April 17.)

SIR : Referring to your instructions numbered 782 of February 7 and 810 of March 2, respecting the protection of seals in Behring Sea, I have the honor

to acquaint you that I received a private note from the Marquis of Salisbury this morning stating that at the request of the Russian ambassador he had appointed a meeting at the foreign office next Wednesday, 11th instant, "to discuss the question of a close time for the seal fishery in Behring Sea," and expressing a hope that I would make it convenient to be present, and I have replied that I shall be happy to attend.

Subsequently I saw M. de Staal, the Russian ambassador, at his request. He referred to the interviews which Mr. Phelps had had with him, of which I was, of course, cognizant, and stated that his full instructions on the subject would not reach London until to-night or to-morrow, and that he was about to leave town until next Wednesday, but meanwhile he could say that his Government would like to have the regulations which might be agreed upon for Behring Sea extended to that portion of the latter in which the Commander Islands are situated, and also to the Sea of Okhotsk (in which Robben Island is situated).

As both these places are outside the limit laid down in your instruction numbered 782 (170° of longitude east from Greenwich), I have thought it best to send you the telegram, of which I inclose a copy herewith.

I am, etc.

HENRY WHITE.

Then on the 20th of April, 1888, Mr. White again writes Mr. Bayard:

Mr. White to Mr. Bayard.

No. 725.]

LEGATION OF THE UNITED STATES,

London, April 20, 1888. (Received April 30.)

SIR: Referring to your instructions Nos. 685, 782, and 810, to Mr. Phelps's dispatches Nos. 618 and 690, and to subsequent correspondence, I have the honor to acquaint you that I called at the foreign office on the 16th instant for the purpose of discussing with the Marquis of Salisbury and M. de Staal, the Russian ambassador, the details of the proposed conventional arrangement for the protection of seals in Bering Sea.

M. de Staal expressed a desire, on behalf of his Government, to include in the area to be protected by the convention the Sea of Okhotsk, or at least that portion of it in which Robben Island is situated, there being, he said, in that region large numbers of seals, whose destruction is threatened in the same way as those in Behring Sea.

He also urged that measures be taken by the insertion of a clause in the proposed convention or otherwise, for prohibiting the importation, by merchant vessels, into the seal-protected area, for sale therein, of alcoholic drinks, firearms, gunpowder, and dynamite.

Lord Salisbury expressed no opinion with regard to the latter proposal, but, with a view to meeting the Russian Government's wishes respecting the waters surrounding Robben Island, he suggested that, besides the whole of Behring Sea, those portions of the Sea of Okhotsk and of the Pacific Ocean north of north latitude 47° should be included in the proposed arrangement.

This suggestion of Lord Salisbury's, therefore, carried down farther south the protected area.

Mr. Phelps. The suggestion of M. de Staal, you mean.

Mr. Carter. No, of Lord Salisbury. Lord Salisbury's sug-

gestion carried the protected area further south from the 50th parallel of latitude down as far as the point upon which my pointer rests (indicating on map), and to include the whole of that part of the Pacific Ocean, so as to embrace not only the Commander Islands, but also Robben Island in the Sea of Okotsk.

His Lordship (that is Lord Salisbury) intimated further that the period preposed by the United States for a close time from April 15th to November 1st might interfere with the trade longer than absolutely necessary for the protection of the seals, etc.

The learned Arbitrators will perceive that at this point the communicating diplomats were so far agreed upon the subject that it was conceived by Lord Salisbury to be in a condition for the preparation of a draft convention.

Afterwards, on the first of May, Mr. Bayard addresses Mr. White : and it is in answer to the last note of Mr. White, which I have just read :

Mr. Bayard to Mr. White.

No. 864.]

DEPARTMENT OF STATE.

Washington, May 1, 1888.

SIR : Your dispatch No. 725 of the 20th ultimo stating the result of your interview with Lord Salisbury and the Russian ambassador relative to the protection of seals in Behring Sea, and requesting further instructions as to their proposals, has been received.

As you have already been instructed, the Department does not object to the inclusion of the sea of Okhotsk, or so much of it as may be necessary, in the arrangement for the protection of the seals. Nor is it thought absolutely necessary to insist on the extension of the close season till the 1st of November.

Only such a period is desired as may be requisite for the end in view. But in order that success may be assured in the efforts of the various Governments interested in the protection of the seals, it seems advisable to take the 15th of October instead of the 1st as the date of the close season, although, as I am now advised, the 1st of November would be safer.

Mr. Bayard now suggests that it be made the 15th of October, splitting the difference, although he says the first of November would be safer.

Mr. White, in his next note to Mr. Bayard suggests a further stage which the matter had then reached. On the 20th of June, 1888, he thus writes :

Mr. White to Mr. Bayard.

No. 786.]

LEGATION OF THE UNITED STATES,

London, June, 20, 1888. (Received June 30.)

SIR : I have the honor to inform you that I availed myself of an early opportunity to acquaint the Marquis of Salisbury and the Russian ambassador of the receipt of your instructions numbered 864, of May 3, and shortly .

afterwards (May 16) his excellency and I called together at the foreign office for the purpose of discussing with his lordship the terms of the proposed convention for the protection of seals in Behring Sea. Unfortunately Lord Salisbury had just received a communication from the Canadian Government stating that a memorandum on the subject would shortly be forwarded to London, and expressing a hope that pending the arrival of that document no further steps would be taken in the matter by Her Majesty's Government. Under these circumstances Lord Salisbury felt bound to await the Canadian memorandum before proceeding to draft the convention.

I have inquired several times whether this communication from Canada had been received, but it has not yet come to hand. I was informed to-day by Lord Salisbury that an urgent telegram had been sent to Canada a week ago with respect to the delay in its expedition, and that a reply had been received by the secretary of state for the colonies stating that the matter would be taken up immediately. I hope, therefore, that shortly after Mr. Phelps's return this Government will be in a condition to agree upon the terms of the proposed convention.

I have the honor to inclose for your information the copy of a question asked by Mr. Gourley and answered by Sir James Fergusson in behalf of the British Government with respect to the seal fishing in Behring Sea.

I have, etc.,

HENRY WHITE.

(For inclosure see Senate Ex. Doc. No. 106, Fiftieth Congress, second session, p. 103.)

At this point an obstacle was for the first time interposed in the progress of the negotiations which otherwise would in all probability have resulted in a final agreement between the two countries for the preservation of the seals by establishing a close season over the area mentioned, from the first of April to the 15th of October.

Whether that protection would have been adequate is another question which I do not stop now to discuss; but that the convention would except for the obstacle mentioned, have been concluded substantially, securing those terms, it seems to me there can be no reasonable doubt. The obstacle to it arose from the protest on the part of Canada. Lord Salisbury had — very properly, undoubtedly, as the Canadian people were more interested in the prosecution of pelagic sealing than others — sent some communication to the colonial Government in reference to the matter, and had received in response a statement so far as we can gather from this letter of Mr. White, simply objecting to the final conclusion of any such proposed arrangement. I think it may be worth, while in noting this response of Canada, to take a glance at the terms in which Lord Salisbury made the communication to the Canadian Government, which will be found in the Appendix, Vol. 3 of the British Case, p. 196 :

The Marquis of Salisbury to Sir R. Morier.

No 121]

FOREIGN OFFICE, April 16, 1888.

SIR : The Russian Ambassador and the United States' Chargé d'Affaires called upon me this afternoon to discuss the question of the seal fisheries in Behring's Sea, which had been brought into prominence by the recent action of the United States.

The United States' Government had expressed a desire that some agreement should be arrived at between the three Governments for the purpose of prohibiting the slaughter of the seals during the time of breeding ; and at my request, M. de Staal had obtained instructions from his Government on that question.

At this preliminary discussion it was decided provisionally, in order to furnish a basis for negotiation, and without definitively pledging our Governments, that the space to be covered by the proposed Convention should be the sea between America and Russia north of the 47th degree of latitude ; that the close time should extend from the 15th April to the 1st November ; that during that time the slaughter of all seals should be forbidden ; and vessels engaged in it should be liable to seizure by the cruisers of any of the three powers, and should be taken to the port of their own nationality for condemnation ; that the traffic in arms, alcohol, and powder should be prohibited in all the islands of those seas ; and that, as soon as the three Powers had concluded a Convention, they should join in submitting it for the assent of the other Maritime Powers of the northern seas.

The United States' Chargé d'Affaires was exceedingly earnest in pressing on us the importance of dispatch on account of the inconceivable slaughter that had been and was still going on in these seas. He stated that, in addition to the vast quantity brought to market, it was a common practice for those engaged in the trade to shoot all seals they might meet in the open sea, and that of these a great number sank, so that their skins could not be recovered.

I am, etc.,

SALISBURY.

The learned Arbitrators will now see the manner in which the negotiations pending between the two Governments was notified to the Canadian Government.

Sir Charles Russell. That was to Sir Robert Morier. That was to Russia, not to Canada.

The President. Sir Robert Morier was in St. Petersburg.

Mr. Foster. A copy of the same note was sent to Sir Lionel Sackville West.

Mr. Carter. What Sir Charles Russell says may be true ; but a copy of the same note was sent to Sir Lionel Sackville West at Washington.

Sir Charles Russell. Yes ; it was sent to Washington, not to Canada.

The President. That is not a communication made to Canada. You spoke of a communication to the Canadian Government. Sir Lionel Sackville West was in Washington.

Mr. Carter. Yes ; he was in Washington ; but the evidence

that the communication was sent to Canada is not derived from this note of Salisbury to Morier, and which was also sent to Sir Lionel Sackville West. I am in error in stating, if I did state, that that was the form in which Canada was apprised of the state of negotiations; but that at this time Canada was so apprised is stated in the communications which I have read.

Mr. Justice Harlan. You will find on page 199 of the British Case, Appendix, Vol. III, the letter from the Colonial Office to the Foreign Office, in which Lord Knutsford acknowledges the receipt of the letter of the 20th, transmitting a copy of a dispatch addressed to Her Majesty's Ambassador at St. Petersburg.

The President. That is the same dispatch that was sent to the Canadian Government.

Mr. Justice Harlan. The answer of the Canadian Government is on page 212 of that volume.

Mr. Carter. On page 199 of the third volume of the Appendix to the British Case, is found the following communication from the British Colonial Office to the Foreign Office :

Colonial Office to Foreign Office.

N^o 128]

DOWNING STREET, April 25, 1888.

(Received April 26).

SIR, I am directed by Lord Knutsford to acknowledge the receipt of your letter of the 20th instant, transmitting a copy of a dispatch addressed to Her Majesty's Ambassador at St. Petersburg respecting the proposed establishment of a close time for seals in Behring's Sea.

And that dispatch is the same as the one from the Marquis of Salisbury to Sir Robert Morier, so that it did get from the Foreign Office of the British Government to the Colonial Office and the receipt of it is thus acknowledged.

The dispatch continues :

In reply, I am to inclose, for the information of the Marquis of Salisbury, a copy of the extender of a telegram which was sent to the Governor-General of Canada, on his Lordship's suggestion, inquiring whether the Dominion Government were aware of any objection to the proposed arrangement.

I am also to inclose a copy of a dispatch from Lord Lansdowne, in the two concluding paragraphs of which he points out that the probable effect of the proposed close time on the operations of the Canadian sealers would be to exclude them completely from the rights which they have until lately enjoyed without question or molestation.

In these circumstances, it is probable that the United States' proposals may not be accepted by Canada without reserve, and Lord Knutsford would suggest that, pending the receipt of the observations of the Dominion Government in response to the invitation contained in his dispatch of the 8th March, referred to by Lord Lansdowne, no final action should be taken in the matter.

I am, etc.,

ROBERT G. W. HERBERT.

Lord Knutsford to the Marquis of Lansdowne.

Inclosure 1 in N° 128.

My Lord,

DOWNING STREET, April 21, 1888.

I have the honour to acquaint you that I have this day telegraphed to you, with reference to your dispatch of the 9th instant, that negotiations are proceeding between Russia, the United States, and Great Britain with regard to the establishment of a close time, during which it would be unlawful to kill seals at sea, in any manner, to the north of the 47th parallel of latitude between the coasts of Russia and America, and inquired whether your Government was aware of any objection to the proposed arrangement.

I added that, of course, as regards Canadian waters, Canadian legislation would be necessary.

I have, etc.,

KNUTSFORD.

We now perceive that the conclusion of the negotiations —
Sir Charles Russell. I beg pardon ; but the dispatch referred to from Lord Lansdowne was on the 9th of April.

Mr. Carter. Would you like to have me read it?

Sir Charles Russell. It precedes the one you have read in point of time. I do not wish, however, to put you to any inconvenience.

Mr. Carter. This is the enclosure from Lord Lansdowne who was the head of the Colonial Office in London :

The Marquis of Lansdowne to Lord Knutsford.

Inclosure 2 in N° 128.

(Extract.)

GOVERNMENT HOUSE, Ottawa, April 9, 1888.

In reference to my despatch of the 29th March, I have the honour to inclose herewith copy of a telegram, dated the 5th instant, from the Attorney-General of British Columbia to Sir John Macdonald, acquainting him that my telegram, of which a copy was sent to you in the above despatch, had been published in the provincial press as a warning to sealing-vessels, and that there was reason to believe that these vessels had, in consequence of the intimation thus given, ceased to arm themselves for the purpose of resisting the cruizers of the United States.

I have forwarded to you by this mail copies of a telegram received from Sir L. West in reference to the probable action of these cruizers during the present season, and of a telegram addressed to him by me in reply.

I observe that the information obtained by Sir Lionel West from Mr Bayard, which is the same as that communicated to me in your telegraphic despatch of the 6th instant, is merely to the effect that no orders have been issued by the United States for the capture of British ships fishing in the Behring's Sea. I need scarcely point out that this is not equivalent to an assurance that such vessels will not be molested except when found within the 3-mile limit, and

that we are not informed whether any orders which have been already issued in this connection are or are not still in force.

That is in reference to another topic, the request of Great Britain is that instructions should be issued by the United States Government to its cruisers in the Bering Sea not to interfere with British vessels.

He passes from that :

I need scarcely point out that the close time for seals, referred to in your telegram, is created under a Statute of the United States, which is not obligatory except upon the subjects of that Power. The proposal contained in the inclosure to your Confidential despatch of the 8th March, 1888, for the adoption of a similar close season by British fishermen is at present receiving the careful consideration of my Government. Such a close time could obviously not be imposed upon our fishermen without notice or without a fuller discussion than it has yet undergone. You are aware that, during the close time enforced by the United States Statute, the seals, although protected from slaughter by the use of firearms, may be killed in great numbers on their breeding grounds by the persons who enjoy the monopoly of the trade under Concessions from the United States Government. The rest of the year these animals are, according to Mr. Bayard's statement in his despatch of the 7th of February, 1888, "supposed to spend in the open sea south of the Aleutian Islands," where they are probably widely scattered and difficult to find. It would appear to follow that, if concurrent regulations based upon the American Law were to be adopted by Great Britain and the United States, the privileges enjoyed by the citizens of the latter Power would be little if at all curtailed, while British fishermen would find themselves completely excluded from the rights which until lately they have enjoyed without question or molestation.

In making this observation, I do not desire to intimate that my Government would be averse to entering into a reasonable agreement for protecting the fur-bearing animals of the Pacific coast from extermination, but merely that a one-sided restriction such as that which appeared to be suggested in your telegram could not be suddenly and arbitrarily enforced by my Government upon the fishermen or this country.

I have, etc.,

LANSDOWNE.

Mr. Carter. It will now be perceived, let me repeat, that the negotiation entered into between the United States and Great Britain, with every prospect at first of a favorable termination, had been arrested in consequence of protest having been received from the Canadian Government. I do not complain of that, or suggest its impropriety; I am merely stating the fact that it was arrested at that point and in consequence of that protest.

The business continued in a condition of suspense in consequence of that for a very considerable time; although, if I rightly remember, the United States on more than one occasion during the interim rather pressed the British Government to give a decided answer; but the next we hear of it — which is to the point I am engaged upon — is contained in Mr. Phelps' letter to Mr. Bayard of

September 12th, 1888. Mr. Phelps had returned from his absence in the United States and again taken charge of the American embassy in London, and his communication is as follows to Mr. Bayard :

Mr. Phelps to Mr. Bayard

Nº 825]

LEGATION OF THE UNITED STATES,
London, September 12th, 1888. (Received September 22.)

Sir : Referring to the subject of the Alaskan seal fisheries, and to the previous correspondence on the subject between the Department and this legation, I have now the honor to acquaint you with the purport of a conversation which I held with Lord Salisbury in regard to it on the 13th August.

Illness, which has incapacitated me from business during most of the interval, has prevented my laying it before you earlier.

One of the objects of the interview I then sought with his lordship was to urge the completion of the convention between the United States, Great Britain, and Russia, which under your instructions had previously been the subject of discussion between the secretary for foreign affairs, the Russian ambassador, and myself. This convention, as I have before advised you, had been virtually agreed on verbally, except in its details; and the Russian as well as the United States Government were desirous to have it completed. The consideration of it had been suspended for communication by the British Government with the Canadian Government, for which purpose an interval of several months had been allowed to elapse. During this time the attention of Lord Salisbury had been repeatedly recalled to the subject by this legation, and on those occasions the answer received from him was that no reply from the Canadian authorities had arrived.

In the conversation on the 13th, above mentioned, I again pressed for the completion of the convention, as the extermination of the seals by Canadian vessels was understood to be rapidly proceeding. His lordship in reply did not question the propriety or the importance of taking measures to prevent the wanton destruction of so valuable an industry, in which, as he remarked, England had a large interest of its own, but said that the Canadian Government objected to any such restrictions, and that until its consent could be obtained, Her Majesty's Government was not willing to enter into the convention; that time would be requisite to bring this about, and that meanwhile the convention must wait.

It is very apparent to me that the British Government will not execute the desired convention without the concurrence of Canada. And it is equally apparent that the concurrence of Canada in any such arrangement is not to be reasonably expected. Certain Canadian vessels are making a profit out of the destruction of the seal in the breeding season in the waters in question, inhuman and wasteful at it is. That it leads to the speedy extermination of the animal is no loss to Canada, because no part of these seal fisheries belong to that country; and the only profit open to it in connection with them is by destroying the seal in the open sea during the breeding time, although many of the animals killed in that way are lost, and those saved are worth much less than when killed at the proper time.

Under these circumstances, the Government of the United States must, in my opinion, either submit to have these valuable fisheries destroyed or must take measures to prevent their destruction by capturing the vessels employed

in it. Between these alternatives it does not appear to me there should be the slightest hesitation.

Much learning has been expended upon the discussion of the abstract question of the right of *mare clausum*. I do not conceive it to be applicable to the present case.

Here is a valuable fishery, and a large and, if properly managed, permanent industry, the property of the nations on whose shores it is carried on. It is proposed by the colony of a foreign nation, in defiance of the joint remonstrance of all the countries interested, to destroy this business by the indiscriminate slaughter and extermination of the animals in question, in the open neighboring sea, during the period of gestation, when the common dictates of humanity ought to protect them, were there no interest at all involved. And it is suggested that we are prevented from defending ourselves against such depredations because the sea at a certain distance from the coast is free.

The same line of argument would take under its protection piracy and the slave trade, when prosecuted in the open sea, or would justify one nation in destroying the commerce of another by placing dangerous obstructions and derelicts in the open sea near its coasts. There are many things that can not be allowed to be done on the open sea with impunity, and against which every sea is *mare clausum*. And the right of self defense as to person and property prevails there as fully as elsewhere. If the fish upon the Canadian coasts could be destroyed by scattering poison in the open sea adjacent, with some small profit to those engaged in it, would Canada, upon the just principles of international law, be held defenseless in such a case? Yet that process would be no more destructive, inhuman, and wanton than this.

If precedents are wanting for a defense so necessary and so proper it is because precedents for such a course of conduct are likewise unknown. The best international law has arisen from precedents that have been established when the just occasion for them arose, undeterred by the discussion of abstract and inadequate rules.

Especially should there be no hesitation in taking this course with the vessels of a colony which has for three years harassed the fisheries of our country with constant captures of vessels engaged in no violation of treaty or legal rights. The comity of nations has not deterred Canada from the persistent obstruction of justifiable and legitimate fishing by American vessels near its coast. What principle of reciprocity precludes us from putting an end to a pursuit of the seal by Canadian ships which is unjustifiable and illegitimate?

I earnestly recommend, therefore, that the vessels that have been already seized while engaged in this business be firmly held, and that measures be taken to capture and hold every one hereafter found concerned in it. If further legislation is necessary, it can doubtless be readily obtained.

There need be no fear but that a resolute stand on this subject will at once put an end to the mischief complained of. It is not to be reasonably expected that Great Britain will either encourage or sustain her colonies in conduct which she herself concedes to be wrong and which is detrimental to her own interests as well as to ours. More than 10000 people are engaged in London alone in the preparation of seal skins. And it is understood that the British Government has requested that clearances should not be issued in Canada for vessels employed in this business; but the request has been disregarded.

I have, etc.,

E. J. PHELPS.

The learned Arbitrators will perceive that Mr. Phelps, at least, came to the conclusion at this moment that the further progress of the negotiation and any successful conclusion of it was impossible; and impossible in consequence of the intervention of Canada; and that any assent to regulations which might be proposed and which would be effective for the purpose would never be given by the Canadian Government. Whether he was right or wrong in that opinion upon his part is not to my present purpose. It will perhaps be the subject of future discussion; but it is safe to conclude from the correspondance that I have read to the Tribunal that the consummation of the negotiation was arrested at this point—arrested by the intervention of Canada, and I do not find anywhere in this correspondence any suggestion on the part of Canada of another, or different, or modified scheme designed to accomplish the purpose of preserving the seals. I think there is no evidence that Canada had ever submitted any proposition of that sort.

This brings us to the conclusion of what, I think, may properly enough be called the *first stage* of this controversy. It is a stage which embraces these leading features: the capture by the cruisers of the United States of British vessels engaged in pelagic sealing; the objection and the protest of the British Government, the ground of objection being that it was an attempt to enforce a municipal law of the United States upon the high seas; an avoidance of discussion of that question by Mr Bayard; a suggestion by him that the case was one of a peculiar property interest, and a case for the exercise of an exceptional marine jurisdiction, but that it would be wisest and best to avoid a useless and perhaps an irritating and abortive discussion upon the questions of right, if attention of nations could be called to the great fact that here was a useful race of animals, an important blessing given to mankind, threatened with extermination by certain practices, and that therefore it should be the duty, as it was certainly the interest of all nations to join pacifically in regulations designed to prevent the mischief.

It includes the further feature that negotiations were set on foot for the purpose of carrying out these pacific intentions of the American Minister; that they were received promptly in the most friendly manner and in the same spirit by Lord Salisbury, British Secretary for Foreign Affairs; that an agreement was substantially concluded between those parties which would have been carried into effect but for the objection interposed by Canada, a dependency of the British empire, and which was presumably, and in fact most deeply, interested in the carrying on of this pelagic sealing; that, so far as appears, no different scheme, no modified sug-

gestion, designed to carry out the same object was ever formulated by the Government of Canada, but that Canada remained in its condition of simple protest and objection to any scheme of prohibition such as had been presented; and the cessation, apparently final, of the negotiation in consequence of that objection.

Those are the principal features of what I have thought fit to call the first stage in this controversy.

Now let me pass to the second.

Senator Morgan. Mr. Carter, do you understand that a British subject residing in Canada has the right, in a diplomatic sense, an international sense, to the protection of two Governments?

Mr. Carter. Canadian and British?

Senator Morgan. Canadian and British.

Mr. Carter. I never thought of that; and any opinion I might give upon it would be of little value now. In the course of such reflections as I have given to these question, it has not yet occurred to me that that was material.

Senator Morgan. The difficulty, I would suggest, that occurs to my mind is this: I can very well understand how a British subject is entitled to the protection of the British Crown and Government in respect to his national relations; but I do not understand how the Canadian Government, as a Government, can interpose to protect British subjects within Canada, against an avowed policy of the British Government.

Mr. Carter. I had not supposed that the Canadian Government was such a Government as could, in any sovereign capacity, or diplomatically, communicate with other Governments, or assert any rights in respect to other Governments. I had supposed that the colonies of the British Empire occupied substantially some such position as the States of the American Union occupy towards the United States Government, and that the citizens of Canada in reference to any defence which they might desire to make against the acts of other Governments, would be obliged to appeal to the imperial authority; that their own Government was not able to give them any protection. They might appeal to their own Government in the first instance, but that Government, I suppose, would have, in turn, to appeal to the imperial authority. That is what I should suppose the state of the case was; but I may be in error about that.

Sir John Thompson. Like most British subjects Canadians have a right to express their opinion on matters affecting their own interests; and the Canadian Government has the means of expressing that opinion to the British Government.

Mr. Carter. — I should suppose so; yes. A citizen of Canada

has the right of every subject of Great Britain to express his opinion upon all subjects of British policy, I suppose if any such policy should happen to bear heavily upon him; and his own Government furnishes, doubtless, an instrumentality through which he can communicate that expression.

Sir John Thompson. By which he can claim the protection of the British Government.

Mr. Carter. By which he can claim the protection. I should suppose that.

There were some incidental matters connected with this first stage of the controversy, and which occurred during the discussions in relation to it, which make a figure, but an unimportant figure, in it. For instance, there were claims for damages made by the British Government growing out of these seizures, and those claims were persisted in, and from time to time made the subject of demand and of diplomatic communication. In the next place there were further seizures made in the year 1888; but the vessels which were seized in 1888 were all released from seizure with the exception of one, which was the *W. P. Sayward*.

Sir Richard Webster. You mean 1887, not 1888.

Mr. Carter. I mean 1887. In 1887 there were several—five I think—British vessels seized. All of them were released. Upon what grounds they were released, whether technical, or for the reason that it was thought the pending negotiation could be better advanced if causes of irritation were removed, I will not undertake to say. They were in fact released.

Sir Charles Russell. There were seven seizures.

Mr. Carter. Seven seizures. My statement was true that they were all released but one. I think that one was the *W. P. Sayward*. She was carried in, libeled at Sitka, I suppose, and condemned; and from the decree condemning her an appeal was taken to the Supreme Court of the United States; and the question of the rightfulness of the seizure was sought there to be raised.

It was not an appeal that was taken. I am in error in stating that an appeal was taken. The time for appealing had been allowed to pass, and no appeal could be taken; but counsel thereupon resorted to another method which they thought might be effective to raise the question whether these seizures were rightful or not, and determine it as a judicial question. They took the ground that the seizures being outside of the municipal jurisdiction of the United States, and standing upon a law of the United States, the court was without jurisdiction, and therefore they applied to the Supreme Court of the United States for a writ of prohibition upon the inferior tribunal to prevent it from executing the decree which had been made.

The application to the United States Supreme Court for this writ of prohibition was denied, and thus the Supreme Court of the United States disaffirmed the right of this applicant to raise this question in such a way. It is unnecessary for me to go particularly into the grounds upon which the opinion was based, especially as one of the learned Arbitrators happened to be one of the Justices sitting on the Supreme Court Bench at that time and participated in the decision, so that he can, of course, fully acquaint the learned Arbitrators with the grounds on which the action of the Supreme Court was had.

And, finally, in stating the features of this first stage of the controversy, let me say that while, so far as the representatives of Great Britain and the United States were concerned, the attempt at an accommodation by means of an agreed system of regulations failed, yet all parties were at all times agreed upon the prime necessity and obligation, as it were, of both governments, to take some measure or other which should have the effect of preserving the seals from destruction.

Now let me pass to the second stage of the controversy. On the 4th of March, 1889 Mr Harrison succeeded Mr Cleveland in the office of President, and, of course, as happens on these occasions in America, there was a sort of revolution in the administration of the various Departments. Mr. Bayard was succeeded in the State Department by Mr. Blaine, and there was a new American Minister to London. President Harrison, as required by the Statutes of the United States, very soon after his inauguration, made a general proclamation prohibiting all pursuit of seals in the waters of Alaska, and, presumably, instructions were also given to the United States cruisers to put the provisions of the law into force. It will be recollected that some two years had now elapsed since the beginning of negotiations upon this subject — nearly two years. They were initiated in the summer of 1887 and the spring of 1889 had now arrived. The proclamation having been made and instructions given, there followed, early in the sealing season, the arrest of British sealers again, and that action was followed by renewed protests on the part of the British Government. I call the attention of the Tribunal to the letter of Mr. Edwardes to Mr. Blaine. Mr. Edwardes was then in charge of the British mission at Washington. He was actually at Bar Harbor. The letter is on page 195, in the first volume of the Appendix of the American Case.

Mr. Edwardes to Mr. Blaine.

BAR HARBOR, August 24, 1889.

SIR : In accordance with instructions which I have received from Her Majesty's Principal Secretary of State for Foreign Affairs, I have the honor to

state to you that repeated rumors have of late reached Her Majesty's Government that United States cruisers have stopped, searched, and even seized British vessels in Behring Sea outside of the three-mile limit from the nearest land. Although no official confirmation of these rumors has reached Her Majesty's Government, there appears to be no reason to doubt their authenticity.

I am desired by the Marquis of Salisbury to inquire whether the United States Government are in possession of similar information, and further, to ask that stringent instructions may be sent by the United States Government, at the earliest moment, to their officers, with the view to prevent the possibility of such occurrences taking place.

In continuation of my instruction I have the honor to remind you that Her Majesty's Government received very clear assurances last year from Mr. Bayard, at that time Secretary of State, that pending the discussion of the general questions at issue no further interference should take place with British vessels in Behring Sea.

In conclusion, the Marquis of Salisbury desires me to say that Sir Julian Pauncefote, Her Majesty's Minister, will be prepared on his return to Washington in the autumn to discuss the whole question, and Her Majesty's Government wish to point out to the United States Government that a settlement can not but be hindered by any measures of force which may be resorted to by the United States.

I have, etc.,

H. G. EDWARDES.

The learned Arbitrators will see what the situation was at this particular time. The vessels which had been seized in 1887, with the exception of one, the "Sayward", which I have mentioned, had been released. The negotiations were pending and during 1888 no new seizures had been made. What that was in consequence of, it is not important to state. It may have been that such a course was thought on the part of the American Government to be likely to cause irritation which would tend to prevent the adjustment which they sought of the question. At all events, none were made in 1888.

Mr. Cleveland and Mr. Bayard, his Secretary of State, under whose auspices that policy of conciliation had been adopted and pursued, were now out of office. They were succeeded by President Harrison and Mr. Blaine as Secretary of State, of course under the obligation to enforce the laws and policy of the United States. The negotiation for a settlement appeared to be in a state of suspended animation, and with no particular prospect of being renewed; and, therefore, the course of the United States under these circumstances was to re-adopt the policy of enforcing the prohibition of pelagic sealing. That brought the subject again to the attention of the British Government and led to protests on its part. Those protests included the suggestion that assurances had formerly been given by Mr. Bayard that no further seizures would be made pending the discussion. It is not important to my purpose here, but

I must remark that it is denied that such assurances were given, and I do not think there is any evidence of them. Lord Salisbury doubtless thought so.

In the next place the suggestion of the British Government was that instructions should be given to prevent any recurrence of those seizures. This suggestion could not very well be made in the then existing state of business, without the expression of some desire or intention of reopening the negotiations for the adjustment of the matter, and therefore the letter also contained this : "The Marquis of Salisbury desires me to say that Sir Julian Pauncefote, Her Majesty's Minister, will be prepared on his return to Washington in the autumn, to discuss the whole question, and Her Majesty's Government wish to point out to the United States' Government that the settlement cannot but be hindered by any measures of force which may be resorted to by the United States".

The business was new to Mr. Blaine, and the whole subject doubtless new to him. He answered Mr. Edwardes. His answer is short :

Mr. Blaine to Mr. Edwardes.

BAR HARBOR, August 24, 1889.

SIR : I have the honor to acknowledge the receipt of your communication of this date, conveying to me the intelligence "that repeated rumors have of late reached Her Majesty's Government that United States cruisers have stopped, searched, and even seized British vessels in Behring Sea outside the 3-mile limit from the nearest land". And you add that, "although no official confirmation of these rumors has reached Her Majesty's Government, there appears to be no reason to doubt their authenticity".

In reply I have the honor to state that the same rumors, probably based on truth, have reached the Government of the United States, but that up to this date there has been no official communication received on the subject.

It has been and is the earnest desire of the President of the United States to have such an adjustment as shall remove all possible ground of misunderstanding with Her Majesty's Government concerning the existing troubles in the Behring Sea; and the President believes that the responsibility for delay in the adjustment can not be properly charged to the Government of the United States.

I beg you will express to the Marquis of Salisbury the gratification with which the Government of the United States learns that Sir Julian Pauncefote, Her Majesty's Minister, will be prepared, on his return to Washington in the autumn, to discuss the whole question. It gives me pleasure to assure you that the Government of the United States will endeavor to be prepared for the discussion, and that, in the opinion of the President, the points at issue between the two Governments are capable of prompt adjustment on a basis entirely honorable to both.

I have, etc.,

JAMES G. BLAINE.

But Mr. Edwardes pressed for a more categorical answer to his note. On the 12th of September he writes :

Mr. Edwardes to Mr. Blaine.

WASHINGTON, September 12, 1889.

MY DEAR MR. BLAINE : I should be very much obliged if you would kindly let me know when I may expect an answer to the request of Her Majesty's Government, which I had the honor of communicating to you in my note of the 24th of August, that instructions may be sent to Alaska to prevent the possibility of the seizure of British ships in Behring Sea. Her Majesty's Government are earnestly awaiting the reply of the United States Government on this subject, as the recent reports of seizures having taken place are causing much excitement both in England and in Canada.

I remain, etc.,

H. G. EDWARDES.

Mr. Blaine answers that :

Mr. Blaine to Mr. Edwardes.

BAR HARBOR, September 14, 1889.

SIR : I have the honor to acknowledge the receipt of your personal note of the 12th instant, written at Washington, in which you desire to know when you may expect an answer to the request of Her Majesty's Government, "that instructions may be sent to Alaska to prevent the possibility of the seizure of British ships in Behring Sea."

I had supposed that my note of August 24 would satisfy Her Majesty's Government of the President's earnest desire to come to a friendly agreement touching all matters at issue between the two Governments in relation to Behring Sea, and I had further supposed that your mention of the official instruction to Sir Julian Pauncefote to proceed, immediately after his arrival in October, to a full discussion of the question, removed all necessity of a preliminary correspondence touching its merits.

Referring more particularly to the question of which you repeat the desire of your Government for an answer, I have the honor to inform you that a categorical response would have been and still is impracticable — unjust to this Government, and misleading to the Government of Her Majesty. It was therefore the judgment of the President that the whole subject could more wisely be remanded to the formal discussion so near at hand which Her Majesty's Government has proposed, and to which the Government of the United States has cordially assented.

It is proper, however, to add that any instruction sent to Behring Sea at the time of your original request, upon the 24th of August, would have failed to reach those waters before the proposed departure of the vessels of the United States.

I have, etc.,

JAMES G. BLAINE.

These letters, it will certainly be agreed, are diplomatic — one party pressing for an answer to a question, and the other gently deferring it and looking to a period when a more satisfactory discussion should be brought on.

Sir Charles Russell. The next letter from Lord Salisbury is important.

Mr. Carter. I have not marked it as important, but if you think so Sir Charles, I will be glad to read it.

Sir Charles Russell. I wish you would. It is on the same page, 197.

Mr. Carter. I will do so. It is from Lord Salisbury to Mr. Edwardes and was left at the Department of State.

The Marquis of Salisbury to Mr Edwardes.

[Left at the Department of State by Mr Edwardes.]

FOREIGN OFFICE, October 2, 1889.

SIR : At the time when the seizures of British ships hunting seals in Behring's Sea during the years 1886 and 1887 were the subjects of discussion the Minister of the United States made certain overtures to Her Majesty's Government with respect to the institution of a close time for the seal fishery, for the purpose of preventing the extirpation of the species in that part of the world. Without in any way admitting that considerations of this order could justify the seizure of vessels which were transgressing no rule of international law, Her Majesty's Government were very ready to agree that the subject was one deserving of the gravest attention on the part of all the governments interested in those waters.

The Russian Government was disposed to join in the proposed negotiations, but they were suspended for a time in consequence of objections raised by the Dominion of Canada and of doubts thrown on the physical data on which any restrictive legislation must have been based.

Her Majesty's Government are fully sensible of the importance of this question, and of the great value which will attach to an international agreement in respect to it, and Her Majesty's representative will be furnished with the requisite instructions in case the Secretary of State should be willing to enter upon the discussion.

You will read this dispatch and my dispatch No. 205, of this date, to the Secretary of State, and, if he should desire it, you are authorized to give him copies of them.

I am, etc.,

SALISBURY.

Yes, it is quite important, and I am obliged to my learned friend for the suggestion that it be read.

These demands by the British Government, occasioned by the new seizures, and this sort of diplomatic correspondence having been begun, during which preliminaries the new Government of the United States was occupied in considering the proper attitude to be taken, Mr. Blaine, finally, on the 22nd of January, 1890, addressed Sir Julian Pauncefote and delivered to him the result of the consideration and reflection which President Harrison had given to the subject. This is on the 22nd of January, 1890.

Sir Charles Russell. If you will pardon me one moment you have only read one of those two despatches to which I referred. One was the one I requested, and the other immediately followed it.

Mr. Carter. I did not intend to read it unless you desired it.

Sir Charles Russell. Not at all. Do not go to that trouble.

Mr. Carter. I now read the letter of Mr. Blaine, January 22, 1890 :

Mr. Blaine to Sir Julian Pauncefote.

DEPARTMENT OF STATE,

Washington, January 22, 1890.

SIR : Several weeks have elapsed since I had the honor to receive through the hands of Mr. Edwardes copies of two dispatches from Lord Salisbury complaining of the course of the United States revenue-cutter *Rush* in intercepting Canadian vessels sailing under the British flag and engaged in taking fur seals in the waters of the Behring Sea.

Subjects which could not be postponed have engaged the attention of this Department and have rendered it impossible to give a formal answer to Lord Salisbury until the present time.

In the opinion of the President, the Canadian vessels arrested and detained in the Behring Sea were engaged in a pursuit that was in itself *contra bonos mores*, a pursuit which of necessity involves a serious and permanent injury to the rights of the Government and people of the United States. To establish this ground it is not necessary to argue the question of the extent and nature of the sovereignty of this Government over the waters of the Behring Sea; it is not necessary to explain, certainly not to define, the powers and privileges ceded by His Imperial Majesty the Emperor of Russia in the treaty by which the Alaskan territory was transferred to the United States. The weighty considerations growing out of the acquisition of that territory, with all the rights on land and sea inseparably connected therewith, may be safely left out of view, while the grounds are set forth upon which this Government rests its justification for the action complained of by Her Majesty's Government.

It can not be unknown to Her Majesty's Government that one of the most valuable sources of revenue from the Alaskan possessions is the fur-seal fisheries of the Behring Sea. Those fisheries had been exclusively controlled by the Government of Russia, without interference — or without question, from their original discovery until the cession of Alaska to the United States in 1867. From 1867 to 1886 the possession in which Russia had been undisturbed was enjoyed by this Government also. There was no interruption and no intrusion from any source. Vessels from other nations passing from time to time through Behring Sea to the Arctic Ocean in pursuit of whales had always abstained from taking part in the capture of seals.

This uniform avoidance of all attempts to take fur seal in those waters had been a constant recognition of the right held and exercised first by Russia and subsequently by this Government. It has also been the recognition of a fact now held beyond denial or doubt that the taking of seals in the open sea rapidly leads to their extinction. This is not only the well-known opinion of experts, both British and American, based upon prolonged observation and investigation, but the fact had also been demonstrated in a wide sense by the well-nigh total destruction of all seal fisheries except the one in the Behring Sea, which the Government of the United States is now striving to preserve, not altogether for the use of the American people but for the use of the world at large.

The killing of seals in the open sea involves the destruction of the female in common with the male. The slaughter of the female seal is reckoned as

an immediate loss of three seals, besides the future loss of the whole number which the bearing seal may produce in the successive years of life. The destruction which results from killing seals in the open sea proceeds, therefore, by a ratio which constantly and rapidly increases, and insures the total extermination of the species within a very brief period. It has thus become known that the only proper time for the slaughter of seals is at the season when they betake themselves to the land, because the land is the only place where the necessary discrimination can be made as to the age and sex of the seal. It would seem, then, by fair reasoning, that nations not possessing the territory upon which seals can increase their numbers by natural growth, and thus afford an annual supply of skins for the use of mankind, should refrain from the slaughter in open sea where the destruction of the species is sure and swift.

After the acquisition of Alaska the Government of the United States, through competent agents working under the direction of the best experts, gave careful attention to the improvement of the seal fisheries. Proceeding by a close obedience to the laws of nature, and rigidly limiting the number to be annually slaughtered, the Government succeeded in increasing the total number of seals and adding correspondingly and largely to the value of the fisheries. In the course of a few years of intelligent and interesting experiment the number that could be safely slaughtered was fixed at 100,000 annually. The Company to which the administration of the fisheries was intrusted by a lease from this Government has paid a rental of \$50,000 per annum, and in addition thereto \$2.62½ per skin for the total number taken. The skins were regularly transported to London to be dressed and prepared for the markets of the world, and the business had grown so large that the earnings of English laborers, since Alaska was transferred to the United States, amount in the aggregate to more than \$12,000,000.

The entire business was then conducted peacefully, lawfully, and profitably—profitably to the United States for the rental was yielding a moderate interest on the large sum which this Government had paid for Alaska, including the rights now at issue; profitably to the Alaskan Company, which, under governmental direction and restriction, had given unwearied pains to the care and development of the fisheries; profitably to the Aleuts, who were receiving a fair pecuniary reward for their labors, and were elevated from semisavagery to civilization and to the enjoyment of schools and churches provided for their benefit by the Government of the United States; and, last of all, profitably to a large body of English laborers who had constant employment and received good wages.

This, in brief, was the condition of the Alaska fur-seal fisheries down to the year 1886. The precedents, customs, and rights had been established and enjoyed, either by Russia or the United States, for nearly a century. The two nations were the only powers that owned a foot of land on the continents that bordered, or on the islands included within, the Behring waters where the seals resort to breed. Into this peaceful and secluded field of labor, whose benefits were so equitably shared by the native Aleuts of the Pribilof Islands, by the United States, and by England, certain Canadian vessels in 1886 asserted their right to enter, and by their ruthless course to destroy the fisheries and with them to destroy also the resulting industries which are so valuable. The Government of the United States at once proceeded to check this movement, which, unchecked, was sure to do great and irreparable harm.

It was cause of unfeigned surprise to the United States that Her Majesty's Government should immediately interfere to defend and encourage (surely to encourage by defending) the course of the Canadians in disturbing an industry which had been carefully developed for more than ninety years under the

flags of Russia and the United States—developed in such a manner as not to interfere with the public rights or the private industries of any other people or any other person.

Whence did the ships of Canada derive the right to do in 1886 that which they had refrained from doing for more than ninety years? Upon what grounds did her Majesty's Government defend in the year 1886 a course of conduct in the Behring Sea which she had carefully avoided ever since the discovery of that sea? By what reasoning did Her Majesty's Government conclude that an act may be committed with impunity against the rights of the United States which had never been attempted against the same rights when held by the Russian Empire?

So great has been the injury to the fisheries from the irregular and destructive slaughter of seals in the open waters of the Behring Sea by Canadian vessels, that whereas the Government had allowed 100,000 to be taken annually for a series of years, it is now compelled to reduce the number to 60,000. If four years of this violation of natural law and neighbor's rights has reduced the annual slaughter of seal by 40 per cent, it is easy to see how short a period will be required to work the total destruction of the fisheries.

The ground upon which Her Majesty's Government justifies, or at least defends the course of the Canadian vessels, rests upon the fact that they are committing their acts of destruction on the high seas, viz, more than 3 marine miles from the shore line. It is doubtful whether Her Majesty's Government would abide by this rule if the attempt were made to interfere with the pearl fisheries of Ceylon, which extend more than 20 miles from the shore line and have been enjoyed by England without molestation ever since their acquisition. So well recognized is the British ownership of those fisheries, regardless of the limit of the three-mile line, that Her Majesty's Government feels authorized to sell the pearl-fishing right from year to year to the highest bidder. Nor is it credible that modes of fishing on the Grand Banks, altogether practicable but highly destructive, would be justified or even permitted by Great Britain on the plea that the vicious acts were committed more than 3 miles from shore.

There are, according to scientific authority, "great colonies of fish" on the "Newfoundland banks." These colonies resemble the seats of great populations on land. They remain stationary, having a limited range of water in which to live and die. In these great "colonies" it is, according to expert judgment, comparatively easy to explode dynamite or giant powder in such manner as to kill vast quantities of fish, and at the same time destroy countless numbers of eggs. Stringent laws have been necessary to prevent the taking of fish by the use of dynamite in many of the rivers and lakes of the United States. The same mode of fishing could readily be adopted with effect on the more shallow parts of the banks, but the destruction of fish in proportion to the catch, says a high authority, might be as great as ten thousand to one. Would Her Majesty's Government think that so wicked an act could not be prevented and its perpetrators punished simply because it had been committed outside of the 3 mile line?

Why are not the two cases parallel? The Canadian vessels are engaged in the taking of fur seal in a manner that destroys the power of reproduction and insures the extermination of the species. In exterminating the species an article useful to mankind is totally destroyed in order that temporary and immoral gain may be acquired by a few persons. By the employment of dynamite on the banks it is not probable that the total destruction of fish could be accomplished, but a serious diminution of a valuable food for man might assuredly result. Does Her Majesty's Government seriously maintain that the law of nations is powerless to prevent such violation of the common

rights of man? Are the supporters of justice in all nations to be declared incompetent to prevent wrongs so odious and so destructive?

In the judgment of this Government the law of the sea is not lawlessness. Nor can the law of the sea and the liberty which it confers and which it protects be perverted to justify acts which are immoral in themselves, which inevitably tend to results against the interests and against the welfare of mankind. One step beyond that which Her Majesty's Government has taken in this contention, and piracy finds its justification. The President does not conceive it possible that Her Majesty's Government could in fact be less indifferent to these evil results than is the Government of the United States. But he hopes that Her Majesty's Government will, after this frank expression of views, more readily comprehend the position of the Government of the United States touching this serious question. This Government has been ready to concede much in order to adjust all differences of view, and has, in the judgment of the President, already proposed a solution not only equitable but generous. Thus far Her Majesty's Government has declined to accept the proposal of the United States. The President now awaits with deep interest, not unmixed with solicitude, any proposition for reasonable adjustment which Her Majesty's Government may submit. The forcible resistance to which this Government is constrained in the Behring Sea is, in the President's judgment, demanded not only by the necessity of defending the traditional and long-established rights of the United States, but also the rights of good government and of good morals the world over.

In this contention the Government of the United States has no occasion and no desire to withdraw or modify the positions which it has at any time maintained against the claims of the Imperial Government of Russia. The United States will not withhold from any nation the privileges which it demanded for itself when Alaska was part of the Russian Empire. Nor is the Government of the United States disposed to exercise in those possessions any less power or authority than it was willing to concede to the Imperial Government of Russia when its sovereignty extended over them. The President is persuaded that all friendly nations will concede to the United States the same rights and privileges on the lands and in the waters of Alaska which the same friendly nations always conceded to the Empire of Russia.

I have, etc.,

JAMES G. BLAINE.

The President. If you please, Mr. Carter, you may continue your argument to-morrow.

Tribunal adjourned until Thursday, April 13th at 11. 30 a. m.

EIGHTH DAY. APRIL 13TH, 1893

The Tribunal met pursuant to adjournment.

The President. Mr. Carter, when you are ready to continue your argument, we will hear you with pleasure.

Mr. Carter. Mr. President, when the Tribunal adjourned yesterday I was engaged in explaining the leading features of what I called the second stage of the controversy; which commenced with the beginning of the administration of President Harrison. I had in substance brought out, or endeavored to bring out, these features: that for a considerable period of time prior to the accession of President Harrison the negotiations which had been entered into between the two Governments had been interrupted in consequence of the objection of Canada, and they were in a state of suspended animation, so to speak, with no immediate prospect of their being renewed; that under these circumstances President Harrison felt it his duty to issue the proclamation required of him by law, forbidding all pelagic sealing in the waters of Alaska; that that proclamation was followed by additional seizures, and those seizures brought renewed protests from the British Government, and thus the controversy was renewed; that the demands of the British Government consequent upon their seizures were repeated from time to time, and some pressure was exerted upon the United States for the purpose of inducing the Government to issue instructions to prevent the further interference with British vessels engaged in pelagic sealing; that while this was going on, the Government of President Harrison took the whole subject into consideration, and finally the views of the Government were expressed in a note by Mr. Blaine to Sir Julian Pauncefote, with the reading of which the session of yesterday was concluded.

The Tribunal will have observed that Mr. Blaine in this quite long note stated rather fully the substantial ground upon which the Government of the United States placed itself. Those grounds had not been theretofore stated. They had been hinted at and intimated by Mr. Secretary Bayard in his instructions to the American Ministers at foreign Governments, designed to call the attention of foreign Governments to the subject with the view that some amicable adjustment of the matter might be made without any resort

to discussions upon which differences of opinion might be entertained. He avoided, in other words, all discussion of the grounds of right upon which the United States placed itself. That discussion of the grounds of right, that statement of the attitude and position of the United States Government, was made for the first time by Mr. Blaine in the note which I read just at the close of yesterday's session. In substance those grounds were that the United States was carrying on an industry in relation to these seals, caring for them, cherishing them, taking the natural increase from the herd and preserving the stock on the Pribilof Islands; that this was an industry advantageous not only to its lessees but, what was of much more importance, advantageous to mankind; that the pursuit of pelagic sealing threatened that industry with destruction, destruction not only to the interests of the United States and its citizens but also to the larger interests of mankind; that it was essentially and absolutely wrong, and should not be permitted, and therefore that the United States had a right to prevent it, when, added to its essentially destructive and illegitimate character, it had this injurious effect upon a special industry and right of the United States. Those were the grounds upon which the case of the United States was put by Mr. Blaine, and put by him, as I have already said, for the first time in that full and complete form.

After the receipt of that note by Sir Julian, he addressed the following brief communication to Mr. Blaine, which is found on page 204 of the American Appendix :

Sir Julian Pauncefote to Mr. Blaine.

WASHINGTON, February 10, 1890.

SIR : Her Majesty's Government have had for sometime under their consideration the suggestion made in the course of our interviews on the question of the seal fisheries in Behring's Sea, that it might expedite a settlement of the controversy if the tripartite negotiation respecting the establishment of a close time for those fisheries which was commenced in London in 1888, but was suspended owing to various causes, should be resumed in Washington.

I now have the honor to inform you that Her Majesty's Government are willing to adopt this suggestion, and if agreeable to your Government will take steps concurrently with them to invite the participation of Russia in the renewed negotiations.

I have, etc.,

JULIAN PAUNCEFOTE.

Here we find a suggestion from the Government of Great Britain that the original negotiations, which had been interrupted for various causes, should be renewed in the city of Washington and that suggestion was accepted by Mr. Blaine. After that it appears that some personal communications had taken place in Washing-

ton between Mr. Blaine and Sir Julian respecting the resumption of the negotiations, and the probability, or possibility, that they might be brought to a successful issue. Mr. Blaine had suggested in the course of those personal communications that he thought it quite improbable that the assent of Canada would ever be obtained to any regulations or to any settlement which would have the effect of protecting the seals from extermination. I presume — it seems fairly presumable — that Sir Julian had answered those suggestions by intimating that he was of a contrary opinion, and that it was not impossible for some arrangement to be reached which would be satisfactory to Canada upon the subject. This rather called upon Sir Julian to submit some proposition that would presumably be agreeable to Canada, and which he might suppose would not be unacceptable to the American Government; and consequently in April 1890 — the date is not given; it appears to have been received on the 30th of April — Sir Julian addresses Mr. Blaine, on page 204 thus : —

Sir Charles Russell. The date is the 29th, I think.

Mr. Carter. The 29th.

Sir Julian Pouncefote to Mr. Blaine.

WASHINGTON, April —, 1890, (Received April 30.)

DEAR MR. BLAINE : At the last sitting of the Conference on the Behring Sea Fisheries question, you expressed doubts, after reading the memorandum of the Canadian Minister of Marine and Fisheries, which by your courtesy has since been printed, whether any arrangement could be arrived at that would be satisfactory to Canada.

You observed that the proposals of the United States had now been two years before Her Majesty's Government, that there was nothing further to urge in support of it; and you invited me to make a counter proposal on their behalf. To that task I have most earnestly applied myself, and while fully sensible of its great difficulty, owing to the conflict of opinion and of testimony which has manifested itself in the course of our discussions, I do not despair of arriving at a solution which will be satisfactory to all the Governments concerned. It has been admitted, from the commencement, that the sole object of the negotiation is the preservation of the fur-seal species for the benefit of mankind, and that no considerations of advantage to any particular nation, or of benefit to any private interest, should enter into the question.

I call the attention of the arbitrators particularly to that language. They are golden words and rightly express what should have been, and what should be at all times, the main purpose and the main object in any discussion of these questions, or in any effort to bring about an accommodation.

Such being the basis of negotiation, it would be strange indeed if we should fail to devise the means of solving the difficulties which have unfortunately

arisen. I will proceed to explain by what method this result can, in my judgment, be attained. The great divergence of views which exists as to whether any restrictions on pelagic sealing are necessary for the preservation of the fur seal species, and if so, as to the character and extent of such restrictions, renders it impossible in my opinion to arrive at any solution which would satisfy public opinion either in Canada or Great Britain, or in any country which may be invited to accede to the proposed arrangement, without a full inquiry by a mixed commission of experts, the result of whose labors and investigations, in the region of the seal fishery, would probably dispose of all the points in dispute.

As regards the immediate necessities of the case I am prepared to recommend to my Government for their approval and acceptance certain measures of precaution which might be adopted provisionally and without prejudice to the ultimate decision on the points to be investigated by the commission. Those measures, which I will explain later on, would effectually remove all reasonable apprehension of any depletion of the fur-seal species, at all events, pending the report of the commission.

It is important, in this relation, to note that while it has been contended on the part of the United States Government that the depletion of the fur-seal species has already commenced, and that even the extermination of the species is threatened within a measurable space of time, the latest reports of the United States agent, Mr. Tingle, are such as to dissipate all such alarms.

Mr. Tingle, in 1887, reported that the vast number of seals was on the increase, and that the condition of all rookeries could not be better.

In his later report, dated July 31, 1888, he wrote as follows:

I am happy to be able to report that, although late landing, the breeding rookeries are filled out to the lines of measurement heretofore made, and some of them much beyond those lines, showing conclusively that seal life is not being depleted, but is fully up to the estimate given in my report of 1887.

Mr. Elliot, who is frequently appealed to as a great authority on the subject, affirms that, such is the natural increase of the fur seal species that these animals, were they not preyed upon by killer whales (*Orca Gladiator*), sharks and other submarine foes would multiply to such an extent that "Behring Sea itself could not contain them."

The Honorable Mr. Tupper has shown in his memorandum that the destruction of seals caused by pelagic sealing is insignificant in comparison with that caused by their natural enemies, and gives figures exhibiting the marvelous increase of seals in spite of the depredations complained of.

Again the destructive nature of the modes of killing seals by spears and firearms has apparently been greatly exaggerated as may be seen from the affidavits of practical seal hunters which I annex to this letter, together with a confirmatory extract from a paper upon the "Fur-Seal Fisheries of the Pacific Coast and Alaska," prepared and published in San Francisco and designed for the information of Eastern United States Senators and Congressmen.

The Canadian Government estimate the percentage of seals so wounded or killed and not recovered at 6 per cent.

In view of the facts above stated, it is improbable that pending the result of the inquiry, which I have suggested, any appreciable diminution of the fur seal species should take place, even if the existing conditions of pelagic sealing were to remain unchanged.

But in order to quiet all apprehension on that score, I would propose the following provisional regulations.

1. That pelagic sealing should be prohibited in the Behring Sea, the Sea of Okhotsk, and the adjoining waters, during the months of May and June, and during the months of October, November, and December, which may be termed the "migration periods" of the fur seal.

2. That all sealing vessels should be prohibited from approaching the breeding islands within a radius of 10 miles.

These regulations would put a stop to the two practices complained of as tending to exterminate the species; firstly, the slaughter of female seals with young during the migration periods, especially in the narrow passes of the Aleutian Islands; secondly, the destruction of female seals by marauders surreptitiously landing on the breeding islands under cover of the dense fogs which almost continuously prevail in that locality during the summer.

Mr. Taylor, another agent of the United States Government asserts that the female seals (called cows) go out from the breeding islands every day for food. The following is an extract from his evidence :

These cows go 10 and 15 miles, and even farther. I do not know the average of it — and they are going and coming all the morning and evening. The sea is black with them round about the islands. If there is a little fog and they get out half a mile from shore we can not see a vessel 100 yards even. The vessels themselves lay around the islands there where they pick up a good many seal, and there is where the killing of cows occurs when they go ashore.

Whether the female seals go any distance from the islands in quest of food and if so, to what distance, are questions in dispute, but pending their solution the regulation which I propose against the approach of sealing vessels within 10 miles of the islands for the prevention of surreptitious landing practically meets Mr. Taylor's complaint, be it well founded or not, to the fullest extent; for, owing to the prevalence of fogs, the risk of capture within a radius of 10 miles will keep vessels off at a much greater distance.

This regulation if accepted by Her Majesty's Government would certainly manifest a friendly desire on their part to cooperate with your Government and that of Russia in the protection of their rookeries and in the prevention of any violation of the laws applicable thereto. I have the honor to inclose a draft of a preliminary convention which I have prepared, providing for the appointment of a mixed commission who are to report on certain specified questions within two years.

The draft embodies the temporary regulations above described together, with other clauses which appear to me necessary to give proper effect to them.

Although I believe that it would be sufficient during the "migration periods" to prevent all sealing within a specified distance from the passes of the Aleutian Islands I have out of a deference to your views and to the wishes of the Russian Minister, adopted the fishery line described in Article V, and which was suggested by you at the outset of our negotiation. The draft, of course, contemplates the conclusion of a further convention after full examination of the report of the mixed commission. It also makes provision for the ultimate settlement by arbitration of any differences which the report of the commission may still fail to adjust, whereby the important element of finality is secured, and in order to give to the proposed arrangement the widest international basis, the draft provides that the other powers shall be invited to accede to it.

The above proposals are, of course, submitted *ad referendum*, and it only now remains for me to commend them to your favorable consideration and to that of the Russian Minister. They have been framed by me in a spirit of justice and conciliation, and with the most earnest desire to terminate the con-

trovery in a manner honorable to all parties and worthy of the three great nations concerned.

I have, etc.,

JULIAN PAUNCEFOTE.

(For inclosures see House Ex. Doc. No. 450, pp. 54-60.)

That letter the learned arbitrators will perceive brings forward a somewhat new aspect of the matter. It is designed to lead to a renewal of the negotiations. It proceeds, upon the expressed belief that the great object of all parties should be the preservation of the seals for the benefit of mankind, and that any particular interest should not be allowed to stand in the way of the accomplishment of that prime end.

He then suggests that pending the negotiations some provisional arrangement should be entered into for the purpose of protecting, in the meanwhile, the seals from the destructive pursuit. He suggests there — and it was the first time that any such suggestion was made to the American Government by the British Government, — that there were great differences of opinion as to the facts, and consequently great differences of opinion as to the extent of the protection which was necessary. These differences of opinion as to the facts — which, I say, were thus intimated for the first time — were based in part upon evidence which had been submitted by Sir Julian Pauncefote to Mr. Blaine in the shape of quite a series of documents on the 9th of March preceding. I read now a letter from Sir Julian Pauncefote to Mr. Blaine which is contained in Executive Document. (House of Representatives, 51st Cong., First Session, No. 450.) The letter is found on page 26 of that document, and is as follows:

Sir Julian Pauncefote to Mr. Blaine.

(Extract).

BRITISH LEGATION,
Washington. D. C., March. 9, 1890.

DEAR MR. BLAINE: I have the pleasure to send you herewith the memorandum prepared by Mr. Tupper on the seal fishery question, to which he has appended a note by Mr. Dawson, an eminent Canadian official.

Believe me, etc.,

JULIAN PAUNCEFOTE.

That letter is very likely somewhere in the correspondence contained in the British appendices, but I do not happen to find it.

Mr. Foster. The memorandum accompanying the letter is found in the British Appendix, No. 3, p. 436.

Mr. Carter. The memorandum is found in the British Case at

the place stated by Gen. Foster, but the documents themselves thus furnished are all contained in the third volume of the Appendix to the British Case, p. 436; and it is necessary also to say U. S. No. 2, 1890.

Those documents are too long for me to read and it is not important that I should read them, but I can briefly state their general nature. They contain a great deal of evidence designed to make it appear that the destructive nature of pelagic sealing is not as great as it had some times been represented to be, and also some matter designed to show that the destruction of seals is owing to the practices pursued on the Pribilof Islands by the United States Government in relation to the herd. All that matter which, I presume, proceeded from officials of the Canadian Government, is calculated to show that no extreme measures of protection were necessary.

This communication of documents to the American Government by Sir Julian Pauncefote on March 9, 1890 was, I think I am safe in saying, the first intimation ever received by the Government of the United States that the original measure of prevention suggested by Mr. Phelps to the Marquis of Salisbury and accepted provisionally by him, was too extreme a measure. More than two years had elapsed since that proposition had been submitted and thus provisionally accepted by the Marquis of Salisbury, and during all of that time, although it was known that the adoption of the measure had been arrested in consequence of the objection of Canada, no different measure had been suggested as coming from Canada, and no criticism on the part of Canada upon the character of that proposed restriction had been offered. On the 9th of March, however, evidence showing differences of opinion in respect to the effect of pelagic sealing was placed before the United States Government. Presumably it came from Canada. It is to the differences of opinion expressed in these documents that Sir Julian refers when he says:

The great divergence of views which exists as to whether any restrictions of pelagic sealing are necessary for the preservation of the fur-seal species, and, if so, as to the character and extent of such restrictions, renders it impossible in my opinion to arrive at a solution which would satisfy public opinion either in Canada or Great Britain, or in any country which might be invited to accede to the proposed arrangement, without a full inquiry by a mixed commission of experts, the result of whose labors and whose investigations in the region of the seal fishery would probably dispose of all the points in dispute.

The point, therefore, of Sir Julian is this: "We have now arrived at a difference of view in reference to *matters of fact* connected with seal life and with pelagic sealing. Those differences of

view which now exist between us are irreconcilable upon any evidence which is before us. Our object is however, a common one, the preservation of the seal species for the benefit of mankind. What is needed in order to enable us to come to some arrangement which will accomplish that prime object is that we should be thoroughly informed of the facts, and in a manner which will leave no room for doubt. When we ascertain the truth upon those points, then, presumably, at least, we shall find no difficulty in coming to an agreement. We must recognize the truth as it shall finally be discovered. Whatever measures of protection the truth thus ascertained shall point out as necessary are the ones to be adopted. "

The instrumentality which he suggests—and it is the first suggestion of a method of removing all doubts and ascertaining what the real truth about the matter was—was a mixed commission of experts; and, in saying that they were to be experts, of course it was understood that they should be gentlemen perfectly competent to deal with all the questions which arose in connection with that subject, and with the question of natural history as well; in other words, that they should be men of science, should act under the obligations which attach to men of science, should have no object in view except the ascertainment of the truth itself; and that when the report was received from such gentlemen, its conclusions should be absolutely relied upon by the two Governments as the basis of their action. This is his suggestion.

He further says in this note :

I have the honor to enclose the draft of a preliminary convention which I have prepared, providing for the appointment of a mixed commission, who are to report on certain specific questions within two years.

This matter has been alluded to already in our long debate upon the motion to reject the supplementary report of the Commissioners of Great Britain. It is important, however, that I should briefly allude to it now. The draft convention which he proposed is contained in the same part of volume three, Appendix to the British Case, page 457 :

THE NORTH AMERICAN SEAL FISHERY CONVENTION

TITLE

Convention between Great Britain, Russia, and the United States of America, in relation to the fur-seal fishery in the Behring Sea, the Sea of Ochotsk, and the adjoining waters.

PREAMBLE

The Governments of Russia and of the United States having represented to the Government of Great Britain the urgency of regulating, by means of an in-

ternational agreement, the fur-seal fishery in Behring Sea, the Sea of Ochotsk, and the adjoining waters, for the preservation of the fur-seal species in the North Pacific Ocean; and differences of opinion having arisen as to the necessity for the proposed agreement, in consequence whereof the three Governments have resolved to institute a full inquiry into the subject, and pending the result of such inquiry, to adopt temporary measures for the restriction of the killing of seals during the breeding season, without prejudice to the ultimate decision of the questions in difference in relation to the said fishery.

The said three Governments have appointed as their respective plenipotentiaries.

Who, after having exchanged their full powers which were found to be in good and due form, have agreed upon the following articles :

ARTICLE I

MIXED COMMISSION OF EXPERTS TO BE APPOINTED

The High Contracting Parties agree to appoint a mixed commission of experts who shall inquire fully into the subject and report to the High Contracting Parties within two years from the date of this convention, the result of their investigations, together with their opinions and recommendations on the following questions :

1) Whether regulations properly enforced upon the breeding islands (Robin Island in the Sea of Ochotsk and the Commander Islands and the Pribylov Islands in the Behring Sea) and in the territorial waters surrounding those islands are sufficient for the preservation of the fur-seal species ?

2) If not, how far from the islands is it necessary that such regulations should be enforced in order to preserve the species ?

3) In either of the above cases, what should such regulations provide ?

4) If a close season is required on the breeding islands and territorial waters, what months should it embrace ?

5) If a close season is necessary outside of the breeding islands as well, what extent of waters and what period or periods should it embrace ?

ARTICLE II

ON RECEIPT OF REPORT OF COMMISSION QUESTION OF INTERNATIONAL REGULATIONS TO BE FORTHWITH DETERMINED

On receipt of the report of the Commission and of any separate reports which may be made by individual commissioners, the High Contracting Parties will proceed forthwith to determine what international regulations, if any, are necessary for the purpose aforesaid, and any regulations so agreed upon shall be embodied in a further Convention to which the accession of the other powers shall be invited.

ARTICLE III

ARBITRATION

In case the High Contracting Parties should be unable to agree upon the regulations to be adopted, the questions in difference shall be referred to the arbitration of an impartial government, who shall duly consider the reports hereinbefore mentioned, and whose award shall be final, and shall determine the conditions of the further Convention.

ARTICLE IV

PROVISIONAL REGULATIONS

Pending the report of the Commission and for six months after the date of such report, the High Contracting Parties agree to adopt and put in force as a temporary measure and without prejudice to the ultimate decision of any of the questions in difference in relation to the said fishery, the regulations contained in the next following articles Nos. 5 to 10 inclusive.

ARTICLE V

SEAL FISHERY LINE

A line of demarcation to be called the " seal fishery line " shall be drawn as follows :

From Point Anival at the southern extremity of the Island of Saghalien in the Sea of Ochotsk to the point of intersection of the 50th parallel of north latitude with the 160th meridian of longitude east from Greenwich, thence eastward along the said 50th parallel to its point of intersection with the 160th meridian of longitude west from Greenwich.

ARTICLE VI

CLOSE TIME

The subjects and citizens of the High Contracting Parties shall be prohibited from engaging in the fur-seal fishery and the taking of seals by land or sea north of the seal fishery line from the 1st of May to the 30th of June, and also from the 1st of October to the 30th of December.

ARTICLE VII

PREVENTION OF MARAUDERS

During the intervening period in order more effectively to prevent the surreptitious landing of marauders on the said breeding islands, vessels engaged in the fur-seal fishery and belonging to the subjects and citizens of the High Contracting Parties, shall be prohibited from approaching the said islands within a radius of ten miles.

ARTICLE VIII

FURTHER PROVISIONAL REGULATIONS

The High Contracting Parties may, pending the report of the commission, and on its recommendation or otherwise, make such further temporary regulations as may be deemed by them expedient for better carrying out the provisions of this convention and the purposes thereof.

ARTICLE IX

PENALTY FOR VIOLATION OF PROVISIONAL REGULATIONS

Every vessel which shall be found engaged in the fur-seal fishery contrary to the prohibitions provided for in articles 6 and 7, or in violation of any regulation made under article 8, shall, together with her apparel, equipment,

and contents, be liable to forfeiture and confiscation, and the master and crew of such vessel, and every person belonging thereto, shall be liable to fine and imprisonment.

ARTICLE X

SEIZURE FOR BREACH OF PROVISIONAL REGULATIONS. TRIAL OF OFFENCES

Every such offending vessel or person may be seized and detained by the naval or other duly commissioned officers of any of the High Contracting Parties, but they shall be handed over as soon as practicable to the authorities of the nation to which they respectively belong, who shall alone have jurisdiction to try the offence and impose the penalties for the same. The witnesses and proofs necessary to establish the offence shall also be sent with them and the court adjudicating upon the case may order such portion of the fines imposed or of the proceeds of the condemned vessel to be applied in payment of the expenses occasioned thereby.

ARTICLE XI

RATIFICATION. COMMENCEMENT AND DURATION OF CONVENTION

This convention shall be ratified and the ratifications shall be exchanged at — in six months from the date thereof or sooner if possible. It shall take effect on such day as shall be agreed upon by the High Contracting Parties, and shall remain in force until the expiration of six months after the date of the report of the Commission of experts to be appointed under Article I; but its duration may be extended by consent.

ARTICLE XII

ACCESSION OF OTHER POWERS

The High Contracting Parties agree to invite the accession of the other powers to the present convention.

In other words, his scheme was to obtain this report of a mixed commission of experts, which, in his view, would presumably make it possible for the two Governments to enter into a final convention upon the subject which would accomplish the desired object: that if they should not be able to come to an agreement upon receiving that report, then the points of difference should be referred to the arbitration of an impartial Government. The scheme had, therefore, two aspects. First, to settle the differences by treaty; failing that, by a reference to arbitration. That is what Sir Julian Pauncefote expresses in one part of his letter:

The draft, of course, contemplates the conclusion of a further Convention, after full examination of the Report of the Mixed Commission. It also makes provision for the ultimate settlement by arbitration of any difference which the Report of the Commission may still fail to adjust, whereby the important element of finality is secured; and in order to give to the proposed arrangement the widest international basis, the draft provided that the other Powers shall be invited to accede to it.

There is one feature of the proposal of Sir Julian upon which

I must make an observation; and that is the measure of *interim* protection. I read again from his letter :

1. That pelagic sealing should be prohibited in the Behring Sea, the Sea of Okhotsk, and the adjoining waters, during the months of May and June, and during the months of October, November, and December, which may be termed the "migration periods" of the fur-seal.

2. That all sealing vessels should be prohibited from approaching the breeding islands within a radius of 10 miles.

It suggested a protective zone of that width.

While these negotiations were going on, including these suggestions by Sir Julian of a renewal of the interrupted negotiations on the basis proposed by him, Lord Salisbury had under consideration the note of Mr. Blaine to Sir Julian which I read at the close of yesterday's session and which made a full statement of the position of the United States. On the 22nd of May, 1890, Lord Salisbury sends to Sir Julian his answer, a copy of which was left with Mr. Blaine. That will be found on page 207 of the first volume of the Appendix of the American Case.

The Marquis of Salisbury to Sir Julian Pauncefote.

[Left at the Department of State on June 5 by Sir Julian Pauncefote.]

No. 106.]

FOREIGN OFFICE, May 22d, 1890.

SIR : I received in due course your dispatch No. 9, of the 23d January, inclosing copy of Mr. Blaine's note of the 22d of that month, in answer to the protest made on behalf of Her Majesty's Government on the 12th October last, against the seizure of Canadian vessels by the United States revenue-cutter *Rush* in Behring Sea.

The importance of the subject necessitated a reference to the Government of Canada, whose reply has only recently reached Her Majesty's Government. The negotiations which have taken place between Mr. Blaine and yourself afford strong reason to hope that the difficulties attending this question are in a fair way towards an adjustment which will be satisfactory to both Governments. I think it right, however, to place on record, as briefly as possible, the views of Her Majesty's Government on the principal arguments brought forward on behalf of the United States.

Mr. Blaine's note defends the acts complained of by Her Majesty's Government on the following grounds :

1) That " the Canadian vessels arrested and detained in the Behring Sea were engaged in a pursuit that is in itself *contra bonos mores* — a pursuit which of necessity involves a serious and permanent injury to the rights of the Government and people of the United States ".

2) That the fisheries had been the in the undisturbed possession and under the exclusive control of Russia from their discovery until the cession of Alaska to the United States in 1867, and that from this date onwards until 1886 they had also remained in the undisturbed possession of the United States Government.

3) That it is a fact now held beyond denial or doubt that the taking of seals in the open sea rapidly leads to the extinction of the species, and that therefore nations not possessing the territory upon which seals can increase their numbers by natural growth should refrain from the slaughter of them in the open sea.

Mr. Blaine further argues that the law of the sea and the liberty which it confers do not justify acts which are immoral in themselves, and which inevitably tend to results against the interests and against the welfare of mankind; and he proceeds to justify the forcible resistance of the United States Government by the necessity of defending not only their own traditional and long-established rights, but also the rights of good morals and of good government the world over.

He declares that while the United States will not withhold from any nation the privileges which they demanded for themselves, when Alaska was part of the Russian Empire, they are not disposed to exercise in the possessions acquired from Russia any less power or authority than they were willing to concede to the Imperial Government of Russia when its sovereignty extended over them. He claims from friendly nations a recognition of the same rights and privileges on the lands and in the waters of Alaska which the same friendly nations always conceded to the Empire of Russia.

With regard to the first of these arguments, namely, that the seizure of the Canadian vessels in the Behring's Sea was justified by the fact that they were "engaged in a pursuit that is in itself *contra bonos mores* — a pursuit which of necessity involves a serious and permanent injury to the rights of the Government and people of the United States", it is obvious that two questions are involved: first, whether the pursuit and killing of fur-seals in certain parts of the open sea is, from the point of view of international morality, an offense *contra bonos mores*; and secondly, whether, if such be the case, this fact justifies the seizure on the high seas and subsequent confiscation in time of peace of the private vessels of a friendly nation.

It is an axiom of international maritime law that such action is only admissible in the case of piracy or in pursuance of special international agreement. This principle has been universally admitted by jurists, and was very distinctly laid down by President Tyler in his special message to Congress, dated the 27th February, 1843, when, after acknowledging the right to detain and search a vessel on suspicion of piracy, he goes on to say: "With this single exception, no nation has, in time of peace, any authority to detain the ships of another upon the high seas, on any pretext whatever, outside the territorial jurisdiction".

Now, the pursuit of seals in the open sea, under whatever circumstances, has never hitherto been considered as piracy by any civilized state. Nor, even if the United States had gone so far as to make the killing of fur-seals piracy by their municipal law, would this have justified them in punishing offenses against such law committed by any persons other than their own citizens outside the territorial jurisdiction of the United States.

In the case of the slave trade, a practice which the civilized world has agreed to look upon with abhorrence, the right of arresting the vessels of another country is exercised only by special international agreement, and no one government has been allowed that general control of morals in this respect which Mr. Blaine claims on behalf of the United States in regard to seal-hunting.

But Her Majesty's Government must question whether this pursuit can of itself be regarded as *contra bonos mores*, unless and until, for special reasons, it has been agreed by international arrangement to forbid it. Fur-seals are indisputably animals *feræ naturæ*, and these have universally been regarded by jurists as *res nullius* until they are caught; no person, therefore, can have property in them until he has actually reduced them into possession by capture.

It requires something more than a mere declaration that the Government or citizens of the United States, or even other countries interested in the seal

trade, are losers by a certain course of proceeding, to render that course an immoral one.

Her Majesty's Government would deeply regret that the pursuit of fur-seals on the high seas by British vessels should involve even the slightest injury to the people of the United States. If the case be proved, they will be ready to consider what measures can be properly taken for the remedy of such injury, but they would be unable on that ground to depart from a principle on which free commerce on the high seas depends.

The second argument advanced by Mr. Blaine is that the "fur-seal fisheries of Behring Sea had been exclusively controlled by the Government of Russia, without interference and without question, from their original discovery until the cession of Alaska to the United States in 1867," and that "from 1867 to 1886 the possession, in which Russia had been undisturbed, was enjoyed by the United States Government also without interruption or intrusion from any source".

I will deal with these two periods separately.

First, as to the alleged exclusive monopoly of Russia. After Russia, at the instance of the Russian American Fur Company, claimed in 1821 the pursuits of commerce, whaling, and fishing from Bering Straits to the fifty-first degree of north latitude, and not only prohibited all foreign vessels from landing on the coasts and islands of the above waters, but also prevented them from approaching within 100 miles thereof, Mr. Quincy Adams wrote as follows to the United States Minister in Russia :

The United States can admit no part of these claims; their right of navigation and fishing is perfect, and has been in constant exercise from the earliest times throughout the whole extent of the Southern Ocean, subject only to the ordinary exceptions and exclusions of the territorial jurisdictions.

That the right of fishing thus asserted included the right of killing fur-bearing animals is shown by the case of the United States brig *Loriot*. That vessel proceeded to the waters over which Russia claimed exclusive jurisdiction for the purpose of hunting the sea otter, the killing of which is now prohibited by the United States statutes applicable to the fur-seal, and was forced to abandon her voyage and leave the waters in question by an armed vessel of the Russian Navy. Mr. Forsythe, writing on the case to the American Minister at St. Petersburg on the 4th of May, 1837, said :

It is a violation of the rights of the citizens of the United States immemorially exercised and secured to them as well by the law of nations as by the stipulations of the first article of the convention of 1824, to fish in those seas, and to resort to the coast for the prosecution of their lawful commerce upon points not already occupied.

From the speech of Mr. Sumner, when introducing the question of the purchase of Alaska to Congress, it is equally clear that the United States Government did not regard themselves as purchasing a monopoly. Having dealt with fur-bearing animals, he went on to treat of fisheries, and after alluding to the presence of different species of whales in the vicinity of the Aleutians, said : "No sea is now *mare clausum*; all of these may be pursued by a ship under any flag, except directly on the coast or within its territorial limit."

I now come to the statement that from 1867 to 1886 the possession was enjoyed by the United States with no interruption and no intrusion from any source. Her Majesty's Government can not but think that Mr. Blaine has been misinformed as to the history of the operations in Behring Sea during that period.

The instances recorded in inclosure 1 in this dispatch are sufficient to

prove from official United States sources that from 1867 to 1886 British vessels were engaged at intervals in the fur-seal fisheries with the cognizance of the United States Government. I will here by way of example quote but one.

In 1872 Collector Phelps reported the fitting out of expeditions in Australia and Victoria for the purpose of taking seals in Behring Sea, while passing to and from their rookeries on St. Paul and St. George Islands, and recommended that a steam cutter should be sent to the region of Unimak Pass and the islands of St. Paul and St. George.

Mr. Secretary Boutwell informed him, in reply, that he did not consider it expedient to send a cutter to interfere with the operations of foreigners, and stated: "In addition, I do not see that the United States would have the jurisdiction or power to drive off parties going up there for that purpose, unless they made such attempt within a marine league of the shore".

Before leaving this part of Mr. Blaine's argument, I would allude to his remark that "vessels from other nations passing from time to time through Behring Sea to the Arctic Ocean in pursuit of whales have always abstained from taking part in the capture of seals", which he holds to be proof of the recognition of rights held and exercised first by Russia and then by the United States.

Even if the facts are as stated, it is not remarkable that vessels pushing on for the short season in which whales can be captured in the Arctic Ocean, and being fitted especially for the whale fisheries, neglected to carry boats and hunters for fur-seals or to engage in an entirely different pursuit.

The whalers, moreover, pass through Behring Sea for the fishing grounds in the Arctic Ocean in April and May as soon as the ice breaks up, while the great bulk of the seals do not reach the Pribylof Islands till June, leaving again by the time the closing of the ice compels the whalers to return.

The statement that it is "a fact now held beyond denial or doubt that the taking of seals in the open sea rapidly leads to their extinction" would admit of reply, and abundant evidence could be adduced on the other side. But as it is proposed that this part of the question should be examined by a committee to be appointed by the two Governments, it is not necessary that I should deal with it here.

Her Majesty's Government do not deny that if all sealing were stopped in Behring Sea except on the islands in possession of the lessees of the United States, the seal may increase and multiply at an even more extraordinary rate than at present, and the seal fishery on the island may become a monopoly of increasing value; but they can not admit that this is sufficient ground to justify the United States in forcibly depriving other nations of any share in this industry in waters which, by the recognized law of nations, are now free to all the world.

It is from no disrespect that I refrain from replying specifically to the subsidiary questions and arguments put forward by Mr. Blaine. Till the views of the two Governments as to the obligations attaching, on grounds either of morality or necessity, to the United States Government in this matter, have been brought into closer harmony, such a course would appear needlessly to extend a controversy which Her Majesty's Government are anxious to keep within reasonable limits.

The negotiations now being carried on at Washington prove the readiness of Her Majesty's Government to consider whether any special international agreement is necessary for the protection of the fur-sealing industry. In its absence they are unable to admit that the case put forward on behalf of the United States affords any sufficient justification for the forcible action already taken by them against peaceable subjects of Her Majesty engaged in lawful operations on the high seas.

"The President," says Mr. Blaine, "is persuaded that all friendly nations will concede to the United States the same rights and privileges on the lands and in the waters of Alaska which the same friendly nations always conceded to the Empire of Russia."

Her Majesty's Government have no difficulty in making such a concession. In strict accord with the views which, previous to the present controversy, were consistently and successfully maintained by the United States, they have, whenever occasion arose, opposed all claims to exclusive privileges in the non-territorial waters of Behring Sea. The rights they have demanded have been those of free navigation and fishing in waters which, previous to their own acquisition of Alaska, the United States declared to be free and open to all foreign vessels.

That is the extent of their present contention and they trust that, on consideration of the arguments now presented to them, the United States will recognize its justice and moderation.

I have to request that you will read this dispatch to Mr. Blaine and leave a copy of it with him should he desire it.

I am, etc.,

SALISBURY.

[Inclosure.]

In 1870 Collector Phelps reported "the barque *Cyane* has arrived at this port (San Francisco) from Alaska, having on board 47 seal skins." (See Ex. Doc. No. 83, Forty-fourth Congress, first session.)

In 1872 he reported expeditions fitting out in Australia and Victoria for the purpose of taking seals in Behring Sea, and was informed that it was not expedient to interfere with them.

In 1874, Acting Secretary Sawyer, writing to Mr. Elliott, special agent, said :

"It having been officially reported to this Department by the collector of customs at Port Townsend, from Neah Bay, that British vessels from Victoria cross over into American waters and engage in taking fur-seals (which he represents are annually becoming more numerous on our immediate coast) to the great injury of our sealers, both white and Indian, you will give such proper attention to the examination of the subject as its importance may seem to you, after careful inquiry, to demand, and with a view to a report to the Department of all facts ascertained." (Ditto, May 4, No. 117, p. 114.)

In 1875, Mr. McIntyre, Treasury agent, described how "before proceeding to harsh measures" he had warned the captain of the *Cygnat*, who was shooting seals in Zapadne Bay, and stated that the captain appeared astonished that he was breaking the law. (Ditto, March 15, 1875, No. 130, p. 124.)

In 1880, the fur-seal trade of the British Columbia coast was of great importance. Seven vessels were then engaged in the fishery, of which the greater number were, in 1886 and 1887, seized by the United States Government in Behring Sea.

In 1884 Daniel and Alexander McLean, both British subjects, took the American schooner *San Diego* to Behring Sea, and were so successful that they returned there in 1885, from Victoria, with the *Mary Ellen* and the *Favourite*.

There is the answer of the Government of Great Britain, and the only answer contained in this diplomatic correspondence, to the full statement of the grounds of *right* relied upon by the United States as contained in the note of Mr. Blaine; and, although I am not going into the discussion now of the merits, it is proper for me to call the attention of the learned arbitrators to the manner in which the positions were met. Lord Salisbury states very briefly and fairly enough, the grounds upon which Mr. Blaine placed his contention. He puts them thus :

Mr. Blaine's note defends the acts complained of by Her Majesty's Government on the following grounds :

1. That " the Canadian vessels arrested and detained in the Behring Sea were engaged in a pursuit that is in itself *contra bonos mores* — a pursuit which of necessity involves a serious and permanent injury to the rights of the Government and people of the United States. "

2. That the fisheries had been in the undisturbed possession and under the exclusive control of Russia from their discovery until the cession of Alaska to the United States in 1867, and that from this date onwards until 1886 they had also remained in the undisturbed possession of the United States Government.

3. That it is a fact now held beyond denial or doubt that the taking of seals in the open sea rapidly leads to the extinction of the species, and that therefore nations not possessing the territory upon which seals can increase their numbers by natural growth should refrain from the slaughter of them in the open sea.

Mr. Blaine further argues that the law of the sea and the liberty which it confers do not justify acts which are immoral in themselves, and which inevitably tend to results against the interests and against the welfare of mankind; and he proceeds to justify the forcible resistance of the United States Government by the necessity of defending not only their own traditional and long established rights, but also the rights of good morals and of good government the world over.

There is perhaps a touch of irony in this observation of Lord Salisbury imputing to the United States the assumption of a jurisdiction for the protection of good Government and good morals the world over. That imputation was hardly justified by anything which Mr. Blaine had said. His ground was that the pursuit of pelagic fishing was *contra bonos mores*; in other words it was essentially and under fundamental principles an indefensible wrong. That, of itself, did not give the Government of the United States the right to interfere. Mr. Blaine made no such pretention; but when it was at the same time injurious to a most valuable and lawful interest of the United States, that circumstance gave, as he insisted, the authority to the United States Government to interfere and prevent the doing of an injury to its own interests by acts which were in themselves indefensible wrongs.

Lord Salisbury, further considering the point put forth by Mr. Blaine that pelagic sealing was an offence *contra bonos mores*, says that two questions are involved here: first, whether the pursuit and killing of fur-seals in certain parts of the open sea are, from the point of view of international morality, an offence *contra bonos mores*. This is extremely well stated.

" Second, whether, if such be the case, this fact justifies the seizure on the high seas and subsequent confiscation in time of peace, of the private vessels of a friendly nation. "

Nothing could be better stated than that. The position taken by Mr. Blaine did raise those two questions exactly. First, whe-

ther from the point of view of international morality pelagic sealing is right or wrong. Second, whether if, from the point of view of international morality it is declared to be wrong, that circumstance furnishes to the United States a ground upon which in time of peace to arrest and carry in for condemnation a vessel engaged in the practice.

What is Lord Salisbury's argument? First it is this: Suppose it to be *contra bonos mores*; suppose it to be against international morality; suppose it to be an indefensible wrong; that does not give the United States any right to arrest a vessel engaged in the practice. Why? Because it is in time of peace. That is to say, the proposition of Lord Salisbury is that in time of peace no matter what injury an indefensible act of wrong by the citizens of a foreign power may inflict upon the United States Government, or its citizens, no vessel engaged in the infliction of that wrong can be arrested and detained when she is upon the high seas. I am not going to argue that now; but I will say that he is able to make a pretty happy use of the argument *ad hominem*; and he cites from an American President, John Tyler, a pretty square recognition of that doctrine in a special message communicated to Congress in reference, as I assume from the date, to negotiations concerning the suppression of the slave trade. I am now reading from page 208 of the Appendix. President Tyler says:

"With this single exception (that of piracy,) no nation has in time of peace any authority to detain the ships of another on the high seas on any pretext whatever outside of the territorial jurisdiction."

President Tyler was an American in high official position; but his authority is not binding here, unless it expresses the truth; and this position taken by him we shall show at another stage in the debate to be wholly without foundation. Lord Salisbury must at the time have failed to bear in mind the circumstance that there had been for a century on the statute books of his own nation laws against "hovering" and laws in relation to quarantine, prescribing rules and regulations purporting to bind foreign vessels as well as national vessels, a violation of which upon the high seas, according to the British statutes, would be followed by arrest and condemnation. There are many other instances we shall hereafter note in the argument. This is a very brief suggestion in answer to Mr. Blaine and it does not seem to be very satisfactory. I might add further upon the merits of the case, that the ground is that even if pelagic sealing were *contra bonos mores* it is not piracy. It does not amount to piracy. If it did, any Government might suppress it, and suppress it upon the high seas: but because it does not amount to piracy they cannot. Why can any Govern-

ment upon the high seas suppress piracy? Because it is wrong; because it is an indefensible wrong and a wrong against all nations; and so great a wrong that by a tacit agreement every power is permitted to take measures to suppress it. I cannot perceive the force of the argument which is based upon a supposed distinction between wrongs. If wrongs against all nations may be suppressed by all nations, one wrong may be suppressed as well as another, at least when the commission of the wrong happens to work especial injury against the interest of a particular state, that state may suppress it.

Lord Salisbury then in coming to the other branch of the argument of Mr. Blaine, as he states it, namely that the practice is *contra bonos mores*, makes his answer very brief, and it amounts to this :

No, it is not *contra bonos mores*, because nations have never agreed that it was *contra bonos mores*. They have agreed that piracy was such; they have agreed, in part, that the slave trade was such; but they never have agreed that pelagic sealing was *contra bonos mores*!

Is it true that whether a thing is right or wrong, whether a thing is *contra bonos mores*, or not, depends upon the circumstance whether nations have come together and agreed that it is so? I had supposed that the distinctions between right and wrong were deeper by far than that. I had supposed too that neither piracy, nor the slave trade, would ever have been by agreement between nations regarded as wrong, instead of right, unless by their essential nature before the agreement was reached, they were so.

In that exceedingly brief manner Lord Salisbury disposes of the long contention of Mr. Blaine which condemned pelagic sealing on the ground that it was *contra bonos mores* and destructive of a race of animals useful and essential to the United States, and useful to mankind. I cannot help thinking that he rather avoided, than answered, the argument. He could not have answered the argument without dealing with the nature of that pursuit — its real, essential nature — inquiring whether it was, in fact, actually destructive of a useful race of animals, and if so, whether it could in any form be defended. I am not to anticipate the argument which I shall hereafter make to this Tribunal; but I cannot help thinking that the position of Mr. Blaine was rather evaded than answered by Lord Salisbury. He much prefers to display his power by dealing with the argument which rests upon the pretensions of Russia; and therefore he comes to consider that part of the argument of Mr. Blaine. He says :

The second argument advanced by Mr. Blaine is that the "fur-seal fisheries of Behring Sea had been exclusively controlled by the Government of Russia,

without interference and without question, from their original discovery until the cession of Alaska to the United States in 1867", and that "from 1867 to 1886 the possession, in which Russia had been undisturbed, was enjoyed by the United States Government also with out interruption or intrusion from any source."

The arbitrators will perceive that the contention of Mr. Blaine as thus stated, did not rest upon any assertion that Russia had an original right to defend its exclusive enjoyment of the fur-seal fisheries in Behring Sea by exercising jurisdiction over that sea. It was not an assertion of that character. It was an assertion that, in point of fact, she had enjoyed that right without interruption, and without interference by other Governments during the whole period of her occupation, and that the United States since it had acquired the territory of Alaska from Russia had in a similar manner enjoyed, as a matter of fact, without interruption from other nations, the exclusive right of fur-seal fishery in Behring Sea.

Lord Salisbury's answer does not meet that aspect of the question at all. His answer to it is this : He says that when in 1821 Russia by the celebrated Ukase of that year attempted to assert a sovereign jurisdiction over Behring Sea and to exclude the vessels of all other nations from an area of one hundred miles around the islands, foreign Governments did not assent to it, but protested against it, and that, among others, the United States protested against it; and he cites the language of Mr. John Quincy Adams who was then the American Secretary of State, protesting against those pretensions of Russia. It will be remembered that Lord Salisbury had at an earlier stage of the controversy referred to this same matter, and had endeavored to maintain that the United States Government had no authority to do the acts they had done in Behring Sea, and that they had by their own acts shown that they had no such authority, because they had protested against similar pretensions when made by Russia. But I must again remark that the argument of Mr. Blaine did not put forward the verbal pretensions of the Russian Government; but it put forward the matter of fact of the *exclusive possession* of these fisheries by Russia, and by the United States.

Lord Salisbury towards the conclusion of his note further observes :

Her Majesty's Government do not deny that if all sealing were stopped in Behring Sea except on the islands in possession of the lessees of the United States, the seal may increase and multiply at an even more extraordinary rate than at present, and the seal fishery on the island may become a monopoly of increasing value; but they can not admit that this is sufficient ground to justify the United States in forcibly depriving other nations of any share in

this industry in waters which, by the recognized law of nations, are now free to all the world.

That is another implied assertion that where the waters of the sea are free to the world — that is, on the high seas anywhere — all nations, and the citizens of all nations, are free to do as they please : a proposition which seems to me to stand refuted upon its mere assertion, but which I shall have occasion hereafter to deal with more particularly.

What I have now said describes the position taken by Great Britain in answer to the note of Mr. Blaine, which fully set forth upon its merits the attitude of the United States in reference to pelagic sealing : and my general observation is that while the note is drawn up with exceeding ingenuity and ability, it rather avoids than answers the argument to which it was addressed.

In the course of this correspondence Mr. Blaine already had before him the proposition of Sir Julian Pauncefote for a mixed Commission, which also carried with it a proposal for an interim period of protection, protecting seals during the months of May and June, October, November and December.

Senator Morgan. Mr. Carter, are you referring now to the draft convention which you have just been reading from?

Mr. Carter. That is what I refer to : the draft convention. He still had that before him, and had not answered it. While he had it before him he receives further protest from Sir Julian Pauncefote in reference to seizure. This is found on page 212 of the Appendix to our Case.

Sir Julian Pauncefote to Mr. Blaine.

WASHINGTON, May 23, 1890.

SIR : I have the honor to inform you that a statement having appeared in the newspapers to the effect that the United States revenue cruisers have received orders to proceed to Behring Sea for the purpose of preventing the exercise of the seal fishery by foreign vessels in non-territorial waters, and that statement having been confirmed yesterday by you, I am instructed by the Marquis of Salisbury to state to you that a formal protest by Her Majesty's Government against any such interference with British vessels will be forwarded to you without delay.

I have, etc.,

JULIAN PAUNCEFOTE.

Now, then the situation which confronted Mr. Blaine was this : President Harrison had felt obliged to take methods of suppressing pelagic sealing in the Bering Sea, the negotiations having failed. Those measures for its suppression caused seizures and the seizures caused protests. There were suggestions contained in

the correspondence which I have read of renewed efforts for an accommodation; but nothing had been determined upon. The only proposition which was up for consideration was that which accompanied the note of Sir Julian Pauncefote to Mr. Blaine which I have already mentioned. The question was what should be done with that. The situation before Mr. Blaine was this. Two years, and more than two years, had elapsed since the negotiations were originally entered upon which at first promised to be so speedily successful. The failure of that negotiation was a disappointment, a great disappointment to the Government of the United States. It had felt obliged to proceed with the enforcement of measures designed to suppress pelagic sealing, and now another proposition for negotiation came in with another measure of *interim* protection. And what was that? I presume Mr. Blaine naturally expected that any measure of *interim* protection would be as broad and effective as the one which had been originally proposed by the British Government for final and permanent protection. He had expected that; but now he had this proposition from Sir Julian Pauncefote; and what was it? To appoint a mixed commission of experts who were to report at the expiration of a period of two years! Upon their report being made to the two Governments an effort was to be made to come to an agreement upon it through the means of a convention which would take, no one knows how long. The correspondence which had already occurred had stretched through years. If the effort to come to an agreement by convention should fail, the suggestion was of a reference to the arbitration of some impartial Government. And how long that would take, of course, nobody could say.

At all events the proposition carried with it the probability that measures designed to settle the controversy and to preserve the fur-seals from extermination would be in progress of adjustment for a period of at least five to ten years; and in the meantime the only suggestion for the interim protection of the fur-seals was a protection of them during the months of May and June, October, November and December, leaving them exposed to capture and extermination during the most important months of June, July, August and September.

Well, in his view—it seems to me a not unreasonable one — this proposition carried with it a certainty almost that the whole race would be exterminated before the end of the negotiation was reached; and when Mr. Blaine came to answer it, he answered it with some measure of impatience and irritation. That answer is contained in his letter of May 29, 1890, as it is found on page 212. It is too long to read, and it is not sufficiently important to be read; but I must summarize the contents as well as I may.

It contains the recital of the various steps which up to that time had been taken in the effort to bring the two countries to an agreement. Then on p. 215 it deals with the proposition of Sir Julian :

When you, Mr. Minister, arrived in this country a year ago, there seemed the best prospect for a settlement of this question, but the Russian minister and the American Secretary of State have had the experiences of Mr. Phelps and the Russian ambassador in London repeated. In our early interviews there seemed to be as ready a disposition on your part to come to a reasonable and friendly adjustment as there has always been on our part to offer one. You will not forget an interview between yourself, the Russian minister, and myself, in which the lines for a close season in the Behring Sea laid down by Lord Salisbury were almost exactly repeated by yourself, and were inscribed on maps which were before us, a copy of which is in the possession of the Russian minister, and a copy also in my possession. A prompt adjustment seemed practicable — an adjustment which I am sure would have been honorable to all the countries interested. No obstacles were presented on the American side of the question. No insistence was made upon the Behring Sea as *mare clausum*; no objection was interposed to the entrance of British ships at all times on all commercial errands through all the waters of the Behring Sea. But our negotiations, as in London, were suddenly broken off for many weeks by the interposition of Canada. When correspondence was resumed on the last day of April, you made an offer for a mixed commission of experts to decide the questions at issue.

Your proposition is that pelagic sealing should be prohibited in the Behring Sea during the months of May, June, October, November, and December, and that there should be no prohibition during the months of July, August, and September. Your proposition involved the condition that British vessels should be allowed to kill seals within 10 miles of the coast of the Pribilof Islands. Lord Salisbury's proposition of 1888 was that during the same months, for which the 10-mile privilege is now demanded, no British vessel hunting seals should come nearer to the Pribilof Islands than the 47th parallel of north latitude, about 600 miles.

The open season which you thus select for killing is the one when the areas around the breeding islands are most crowded with seals, and especially crowded with female seals going forth to secure food for the hundreds of thousands of their young of which they have recently been delivered. The destruction of the females which, according to expert testimony would be 95 per cent of all which the sealing vessels might readily capture, would inflict deadly loss upon the rookeries. The destruction of the females would be followed by the destruction of their young on the islands, and the herds would be diminished the next year by this wholesale slaughter of the producing females and their offspring.

The ten-mile limit would give the marauders the vantage ground for killing the seals that are in the water by tens of thousands searching for food. The opportunity, under cover of fog and night, for stealing silently upon the islands and slaughtering the seals within a mile or even less of the keeper's residence would largely increase the aggregate destruction. Under such conditions the British vessels could evenly divide with the United States, within the three-mile limit of its own shores and upon the islands themselves, the whole advantage of the seal fisheries. The respect which the sealing vessels would pay to the ten-mile limit would be the same that wolves pay to a flock of sheep so placed that no shepherd can guard them. This arrangement according to your proposal, was to continue for three months of each year,

the best months in the season for depredations upon the seal herd. No course was left to the United States or to Russia but to reject the proposition.

The propositions made by Lord Salisbury in 1888 and the propositions made by Her Majesty's Minister in Washington in 1890, are in significant contrast. The circumstances are the same, the conditions are the same, the rights of the United States are the same, in both years. The position of England has changed, because the wishes of Canada have demanded the change. The result then with which the United States is expected to be content is that her rights within the Behring Sea and on the islands thereof are not absolute, but are to be determined by one of Her Majesty's provinces.

This proposition was received by Mr. Blaine with some considerable degree of impatience, as will be observed. He seemed to feel that he was confronted at all times with the objection of Canada, and that the objection of Canada was in all instances perfectly effective to prevent the approach to any accommodation. For my own part I see no objection whatever why Great Britain, before she should come to an arrangement of this sort, should consult Canada; because Canada was the province which was more immediately interested. I see no reason for complaint upon that score. It is a little different, however, when we come to consider the circumstance, that originally, when the proposition made by Mr. Phelps was provisionally accepted by Lord Salisbury, it was not stated that it would be dependent upon the wishes of Canada, or dependent upon the result of investigations made after Canada had been consulted. Had that been stated at that time it would have prevented the raising of expectations only to be disappointed.

These observations, of course, do not relate to the merits. They are designed to explain the progress of the negotiations and the sentiments of the negotiators from time to time; and, at this point of time it is very observable that there was on the part of Mr. Blaine a feeling of great impatience, as if he had been in some manner wronged.

Senator Morgan. Mr. Carter, what is the date of that letter, if you please, that you are reading from Mr. Blaine?

Mr. Carter. May 29, 1890.

Senator Morgan. If it would not disturb you I would like to call your attention to page 461 of vol. 3 of the Appendix to the British Case, to a note from the Marquis of Salisbury to Sir Julian Pauncefote. Its number is 332.

Mr. Carter. I have it.

Senator Morgan. It is very short, and for the purpose of calling your attention to the particular language of it I will read it:

SIR: I have received your dispatch of the 29th ultimo covering copy of a note in which you submit to Mr. Blaine the draft convention which has been approved by the Government of Canada for the settlement of the Behring's Sea fisheries question, as well as a copy of the draft convention itself.

The terms of your note are approved by Her Majesty's Government.

The point as it seems to me there, is that there is a wide distinction between the grounds taken by Sir Julian Pauncefote in his note in which he represents the British Government, and which is approved, and the terms of the draft convention.

Mr. Carter. Is it the suggestion of the learned Arbitrator that the terms of the draft convention proposed by Sir Julian Pauncefote had received the approval of Her Majesty's Government?

Senator Morgan. No, sir. It had received the approval of the Canadian Government, as was expressed to Lord Salisbury; but the terms of the note from Sir Julian Pauncefote to the United States Government had been approved by the British Government.

Sir John Thompson. That note referred to there was the note of Sir Julian Pauncefote laying it before Mr. Blaine.

Senator Morgan. Yes; I refer to the discrepancy between that note and the draft convention.

Sir Charles Russell. There is no discrepancy.

Senator Morgan. We differ about that.

Mr. Carter. I had assumed that the note from Sir Julian Pauncefote to Mr. Blaine containing the draft convention proposed by him was agreeable to the Government of Canada, and that, because it was agreeable to the Government of Canada, it was approved by the Government of Her Majesty.

Sir Charles Russell. May I point out, with the permission of my friend, that this is a matter in which my learned friend and I will not differ. The Government of Canada was controlled by the Imperial Government of Her Majesty. The Government of Canada approved of the convention and the Government of Her Imperial Majesty is the only Government which diplomatically could convey the matter to the United States Government.

Senator Morgan. I comprehend that.

Sir Charles Russell. And indeed it was necessary to convey, and only necessary to convey, the fact that the Imperial Government had approved it.

Senator Morgan. I certainly comprehend that; but if in this cautious note of Lord Salisbury he says the Government of Canada has approved of a draft convention and the Government of Her Majesty has approved Sir Julian's note to Mr. Blaine, and then if there is a material and wide discrepancy between the arguments and the statements in Sir Julian Pauncefote's note and those found in the draft convention, why I suppose that it was intended that while the note of Sir Julian with its doctrines and statements was approved by the Government of Her Majesty, the draft convention had been approved and consented to only by Canada. Of course, that was enough for the British Government.

Mr. Carter. There may be more in this than I have per-

ceived; but I have understood the note of Lord Salisbury to Sir Julian Pauncefote as designed to approve of his conduct in transmitting his note with the draft convention to the Government of the United States.

Sir Charles Russell. Quite so.

Mr. Carter. And, in thus approving of his conduct in transmitting in the way he did that draft convention to the Government of the United States, it amounts to an approval of the convention itself.

Senator Morgan. But it is an approval based on the consent of Canada.

Mr. Carter. That is undoubtedly one of the reasons — perhaps the only reason. But it was an approval which had been moved, which was based upon, if you please, the approval of the Government of Canada. I suppose it is quite manifest all along here that the approval of the Government of Great Britain to any measures of restriction upon pelagic sealing were dependent upon the wishes of the Government of Canada. That is the fact which made Mr. Blaine somewhat impatient. I do not argue now whether he was properly or improperly impatient; but it was the fact.

The President. We have only before us in this matter the British Government. We are not to enter into a consideration of the motives upon which the British Government decided what course to adopt. Whether the Canadian Government has an influence upon the decisions of the Imperial Government is a matter of interior consideration by the British Government itself; but we have as a party only the British Government.

Mr. Carter. That is quite true. I am not giving any material consequence to the consideration whether the Government of Great Britain awaited the action of the Government of Canada, or made its own action dependent upon the Government of Canada, except in this point of view, so far as it explains the temper, the disposition of the corresponding diplomats, and the grounds and reasons why one side may have thought that they had a complaint against the other for delay. It is pertinent in that point of view, and in that point of view alone, as I conceive.

Senator Morgan. I beg leave to say this in defence of my position: Mr Carter read with great emphasis this clause from the letter of Sir Julian to Mr. Blaine on page 455:

It has been admitted from the commencement that the sole object of the negotiation is the preservation of the fur-seal species for the benefit of mankind, and that no considerations of advantage to any particular nation or of benefit to any private interest should enter into the question.

And then the learned counsel was proceeding to argue that

under the terms of this convention the fur-seals in Bering Sea resorting to the Pribilof Islands were exposed during the most dangerous period of the year to extermination by the Canadian sealers. He, as I understood, inferred from that that Her Majesty's Government had changed its ground upon the question of the duty of both Governments to preserve the seal herds from extermination.

Mr. Carter. I beg pardon; I did not intend to so argue. I see no evidence here that the Government of Great Britain at any time changed, at least, its avowed ground, that the prime object of these negotiations was to preserve the fur-seal from extinction. That ground as avowed by them at first continued to be avowed until the last. Whether the measures which they actually suggested, or the measures which they were willing to accede to, were such as we might expect from a Government which took that ground, and made that avowal, is a matter about which different opinions may be entertained; but that they ever changed their ground in reference to the necessity of protecting the fur-seal I do not think. It is very far from any intention of mine to make any such assertion. I make the contrary assertion, in reference to the avowed ground of the British Government.

Mr. Blaine, after this letter from which I have read extracts, of May 29th, addresses another letter to Sir Julian Pauncefote before he had received a reply, which was this :

Mr. Blaine to Sir Julian Pauncefote.

DEPARTMENT OF STATE,

Washington, June 2, 1890.

MY DEAR SIR JULIAN : I have had a prolonged interview with the President on the matters upon which we are endeavoring to come to an agreement touching the fur-seal question. The President expresses the opinion that an arbitration can not be concluded in time for this season. Arbitration is of little value unless conducted with the most careful deliberation. What the President most anxiously desires to know is whether Lord Salisbury, in order to promote a friendly solution of the question, will make for a single season the regulation which in 1888 he offered to make permanent. The President regards that as the step which will lead most certainly and most promptly to a friendly agreement between the two Governments.

I am, etc..

JAMES G. BLAINE.

The two Governments now appear to have come to a decided difference respecting the measures which they were prepared to assent to providing for an *interim* preservation of the seal. We have a communication here from Sir Julian that Lord Salisbury thinks that the measure proposed in 1888, and provisionally accepted by him, was too extreme a measure. He is not prepared to

assent to it, and suggests a further difficulty, namely, that, in the absence of legislation by Parliament, the Government would not be enabled to enforce it upon British vessels.

In answer to this suggestion of an inability to execute such a restrictive provision without an act of Parliament, I will say, without reading the correspondence, that Mr. Blaine suggested that the United States Government would be satisfied if, without an act of Parliament, the Government of Great Britain would issue a *proclamation* forbidding pelagic sealing, or requesting vessels to abstain from it. That proposal was answered by Sir Julian on the 27th of June. I read from page 223 of the first volume of the American Appendix :

Sir Julian Pauncefote to Mr. Blaine.

WASHINGTON, June 27, 1890.

SIR : I did not fail to transmit to the Marquis of Salisbury a copy of your note of the 11th instant, in which, with reference to his lordship's statement that British legislation would be necessary to enable Her Majesty's Government to exclude British vessels from any portion of the high seas " even for an hour ", you informed me, by desire of the President, that the United States Government would be satisfied " if Lord Salisbury would by public proclamation simply request that vessels sailing under the British flag should abstain from entering the Behring Sea during the present season ".

I have now the honor to inform you that I have been instructed by Lord Salisbury to state to you in reply that the President's request presents constitutional difficulties which would preclude Her Majesty's Government from acceding to it, except as part of a general scheme for the settlement of the Behring Sea controversy, and on certain conditions which would justify the assumption by Her Majesty's Government of the grave responsibility involved in the proposal.

Those conditions are :

I. That the two Governments agree forthwith to refer to arbitration the question of the legality of the action of the United States Government in seizing or otherwise interfering with British vessels engaged in the Behring Sea, outside of territorial waters, during the years 1886, 1887, and 1889.

II. That, pending the award, all interference with British sealing vessels shall absolutely cease.

III. That the United States Government, if the award should be adverse to them on the question of legal right, will compensate British subjects for the losses which they may sustain by reason of their compliance with the British proclamation.

Such are the three conditions on which it is indispensable, in the view of Her Majesty's Government, that the issue of the proposed proclamation should be based.

As regards the compensation claimed by Her Majesty's Government for the losses and injuries sustained by British subjects by reason of the action of the United States Government against British sealing vessels in the Behring Sea during the years 1886, 1887, and 1889, I have already informed Lord Salisbury of your assurance that the United States Government would not let that claim stand in the way of an amicable adjustment of the controversy, and I trust

that the reply which, by direction of Lord Salisbury, I have now the honor to return to the President's inquiry, may facilitate the attainment of that object for which we have so long and so earnestly labored.

I have, etc.,

JULIAN PAUNCEFOTE.

The President. If you have come to the end of a branch of this subject, I think it would be well to interrupt here.

[The Tribunal there upon took a recess.]

On reassembling

The President said: Mr. Carter, will you resume your argument?

Mr. Carter. I had just read Sir Julian Pauncefote's note to Mr. Blaine, in which he conveys the terms under which Lord Salisbury was prepared to accede to Mr. Blaine's request that the British Government would, by proclamation, request an abstention from pelagic sealing in Bering Sea during the then coming season, or present season. The Arbitrators will observe that Lord Salisbury stated that there were grave constitutional difficulties in the way of taking the course suggested, and that the British Government could not adopt such a course as that unless there were a very complete justification for it: that it created a responsibility which the Government was not prepared to assume unless there was very great occasion for it, but intimated that if three conditions were complied with, they would, notwithstanding, make that request. Those conditions were that the two Governments should forthwith agree to submit to arbitration the question of the legality of the action of the United States Government in making the seizures; that, pending the award, all interference with British vessels by the United States should cease; and third, that the United States Government, if the award should be adverse to it on the question of legal right, would compensate British subjects for their losses.

The learned Arbitrators will observe — of course, they cannot fail to observe — throughout this correspondence the play of diplomatic skill and ability on the part of each side in dealing with the other, and it is observable in these views of Lord Salisbury. He found that the Government of the United States were extremely anxious to prevent pelagic sealing in Bering Sea during the coming season: that, unable to get anything better, they would content themselves with a request from the British Government by proclamation that such sealing should not be engaged in. Finding that they were so anxious upon that score, he thought that by acceding to their views in that particular he might gain certain advantages: first, absolute non-interference with British sealing vessels during the pendency of the negotiation, and second, a reference to arbitration, which should include not only a determina-

tion upon the questions of right, but also a determination upon questions of alleged damages sustained by British vessels. The Arbitrators will here perceive the first direct suggestion of the scheme of an Arbitration upon the questions of *right*. That is the principal feature of this letter. It is true that an arbitration had been at an anterior period suggested by Sir Julian Pauncefote; but it was to be the arbitration of a friendly Government, in case the two Governments should not find themselves able to agree upon the question of *regulations*, after they had received the report of the proposed mixed Commission of experts: and the arbitration thus suggested by Sir Julian Pauncefote was, you will perceive, only upon the question of *regulations*. The arbitration here suggested by Lord Salisbury is one upon the question of legal *right*, and also upon the question of *damages*. We find here, therefore, the first germ of that final submission of the matters in dispute to arbitration which was made by the treaty under which our present proceedings are had. I may at once refer, although it is not in the order which I had adopted, to the answer of Mr. Blaine to this proposal. It is found in his letter of July 2, 1890, on page 239.

Mr. Blaine to Sir Julian Pauncefote.

DEPARTMENT OF STATE,
Washington July 2, 1890

SIR: Your note of the 27th ultimo, covering Lord Salisbury's reply to the friendly suggestion of the President was duly received. It was the design of the President, if Lord Salisbury had been favorably inclined to his proposition, to submit a form of settlement for the consideration of Her Majesty's Government which the President believed would end all dispute touching privileges in Behring Sea. But Lord Salisbury refused to accept the proposal unless the President should "*forthwith*" accept a formal arbitration, which his lordship prescribes.

The President's request was made in the hope that it might lead to a friendly basis of agreement, and he can not think that Lord Salisbury's proposition is responsive to his suggestion. Besides, the answer comes so late that it would be impossible now to proceed this season with the negotiation the President had desired.

An agreement to arbitrate requires careful consideration. The United States is, perhaps, more fully committed to that form of international adjustment than any other power, but it can not consent that the form in which arbitration shall be undertaken shall be decided without full consultation and conference between the two Governments.

I beg further to say that you must have misapprehended what I said touching British claims for injuries and losses alleged to have been inflicted upon British vessels in Behring Sea by agents of the United States. My declaration was that arbitration would logically and necessarily include that point. It is not to be conceded, but decided with other issues of far greater weight.

I have the honor to be, sir, etc.,

JAMES G. BLAINE.

The learned Arbitrators will remember the letter which I read some time ago, before the recess, from Mr. Blaine to Sir Julian Pauncefote, written perhaps under some measure of irritation at what he supposed to be the unreasonable delays of Great Britain and the shifting of ground by her in respect to *interim* measures of protection. To that letter the Marquis of Salisbury writes an answer, or writes a note designed to be an answer, to Sir Julian Pauncefote, on the 20th day of June, 1890. As it does not raise a material point in the discussion, I will not read it, unless my friends on the other side should deem it essential; but I will attempt a summary of it. It is on page 236 of the Appendix to the American Case.

The points that he endeavors to make in it are substantially these : that the agreement which was originally made between him and Mr. Phelps in reference to the close season was a provisional agreement only, not designed to be final ; and the intimation is that the United States were hardly justified in conceiving it to be a final one. He then says that it was dependent upon the views which Canada might entertain of it, although he does not state that he, at the time, stated to Mr. Phelps, or otherwise in such manner that it would reach the American Government, that is was conditional upon any acceptance of it by Canada : and he says that if the United States were not at first apprised of this, they were at a subsequent period, which, indeed, is true, although it was not until after a considerable delay. In the next place, he says that the delay of two years which has been occasioned was not solely in consequence of the objections of Canada, but that it was made necessary in consequence of a divergence of views between the two Governments in respect to the necessity of a measure so stringent as that for the preservation of the fur-seals ; and that, owing to the remoteness of the region from which information was obtainable, a long period of time had necessarily elapsed in the effort to gain information upon which the government could intelligently act. He intimates, besides, that some delay, at least, was chargeable to political emergencies in the United States, meaning, I suppose, the change of administration from that of President Cleveland to that of President Harrison. That is, I believe, a fair statement of the points sought to be made by Lord Salisbury in this note.

The next feature in this stage of the controversy to which I call the attention of the Tribunal is the letter of Mr. Blaine to Sir Julian Pauncefote of June 30th, 1890, which is found on page 224 of the American Appendix. This letter of Mr. Blaine is important, inasmuch as it takes up the argument upon the questions in dispute, as that argument was left by Lord Salisbury's reply to Mr. Blaine's letter, in which he fully set forth the position of the United States.

The Arbitrators will remember that I read Lord Salisbury's reply and briefly commented upon it, pointing out, what appeared upon the face of it, that it was rather an attempt to avoid the ground taken by Mr. Blaine than to really answer it; and to pass over the ground of Mr. Blaine and again rely upon the attitude taken by the United States in 1822, protesting against the pretensions of Russia to an exceptional marine jurisdiction in Bering Sea. The disposition of Lord Salisbury, I remarked, seemed to me to be to draw away the discussion from the substantial ground taken by Mr. Blaine, that of inherent and essential right, and to engage him in a discussion in reference to the validity of Russian pretensions in Behring Sea.

If I were permitted, and if it were worth while to criticise the position of Mr. Blaine as a controversialist, or a negotiator, I should say that he committed an unwise step in responding to the suggestion of Lord Salisbury and suffering himself to be drawn away from the impregnable attitude on which he stood — impregnable, as it seems to me — and which Lord Salisbury had undertaken, as I think, to avoid — and pass over to that region of controversy to which Lord Salisbury had invited him. That was an imprudent step, as it seems to me. The wiser course would have been to have said to Lord Salisbury: "I do not think you have answered the positions which I have taken; and the positions which I have taken are the grounds, the main grounds, upon which the United States bases its contentions; and I shall expect a further and more satisfactory answer to them if it can be made". But he did accept the invitation of Lord Salisbury, and he took up this question of the Russian assumptions of authority in Behring Sea and wrote a long letter in relation to it.

That letter, again, is too long to be read, and not of sufficient importance to be read. The only importance that it has in the aspect of the controversy which I am now presenting to the Tribunal is that it exhibits a stage in the discussion of this question of Russian pretensions in Behring Sea. It is the answer on the part of the United States Government, and the first answer that the United States Government ever made, to the argument of Great Britain that Russia had originally made pretensions similar to this then made by the United States; that these pretensions when made by Russia in 1821 were resisted by the United States Government upon the same grounds upon which Great Britain was now resisting the pretensions of the United States. That was the argument of Lord Salisbury, and Mr. Blaine makes an answer to it here.

I must attempt to summarize that answer of Mr. Blaine, without reading the letter, which is very long, and which I assume, of course, the learned Arbitrators will themselves carefully read.

I must endeavor to present a summary of it, and it is this : Mr. Blaine's argument is that long prior to the year 1821, Russia had, by prior discovery and prior occupation, gained an absolute title to all the territory surrounding Bering Sea; that upon the Siberian coast she had no rival whatever, and had complete possession of the whole territory from Bering Straits down to the 47th parallel of latitude, or in that vicinity : that she had pushed her discoveries on the American coast of Bering Sea also, and had a recognized title to all the territory from Bering Straits down to the 54th degree of latitude, at least, and that she had discovered, and asserted her title to, the whole chain of the Aleutian Islands : that all that was long prior to the year 1821, indeed prior to 1800 : that in the year 1821 she issued her celebrated ukase, the principal point of which was that she asserted an exclusive right to all the products of this whole region, to all the trade of the whole region, and for the purpose of protecting that product and that trade, a right to exclude the vessels of all nations from a belt 100 miles from the shore along all the islands and coasts of the sea. That was her assumption by the ukase. The governments of Great Britain and the United States objected to those claims; but the principal ground of their objection was not to any assumption of authority over the sea, nor to any assumption of authority over the shores of Bering Sea, as to which the whole world admitted that the title of Russia was exclusive, but to the extension of her assertions of exclusive dominion on the coast from about the parallel of 54 North latitude down to the parallel of 51. The point of Mr. Blaine was that the objectionable feature of the ukase in the eyes of both Great Britain and the United States was the assumption of exclusive territorial sovereignty over this coast, from the southern part of Alaska down over a long range of coast which had been familiarly called in commerce and by merchants and navigators who were engaged in trade there the "Northwest Coast". It was the theatre of the rival enterprises of several different nations in commerce. Merchants in the United States had a large trade up there. Great Britain had a large trade there, and Russia had a very considerable trade up there.

The President. And Spain also.

Mr. Carter. And Spain also had some, although I do not know how much it amounted to commercially. She had made pretensions, of course, as we all know, which were subsequently transferred to the United States.

The President. On account of the possession of San Francisco, on that coast.

Mr. Carter. Ah, lower down, of course, Spain had great pretensions; but San Francisco, I think, was rather below what

was commonly termed the Northwest Coast. Spain claimed to parallel 60, I know; but I am speaking of the extent of commerce which she actually had up there. I do not think it was very considerable. Her *claims* extended up there, that we know. I am speaking of the fact that this Northwest Coast, so called, was the theatre of a very extensive trade, principally carried on by three great powers, Great Britain, the United States and Russia. Mr. Blaine's argument was that the principal point of contention between these Governments was the sovereignty assumed by Russia over that coast, which, if successfully maintained by her, would exclude both Great Britain and the United States from the benefit of that trade.

According to Mr. Blaine — this was his argument — that contention was settled between the United States and Russia by the treaty of 1824, and between Great Britain and Russia by the treaty of 1825, and that the ukase of 1821, except so far as it was modified and displaced by this treaty, continued to stand. That was his main proposition. To a certain extent the pretensions asserted by the ukase of 1821 were yielded and surrendered by those two treaties, and so far as they were not thus yielded and surrendered, they continued to stand.

Now, according to his argument, the only particulars in which those pretensions were surrendered were these: a boundary line was established — a southern boundary to the pretensions of Russia, and that was $54^{\circ}, 40'$. The territory in dispute, which was between 60° and 51° was thus divided, you may say, in two. $54^{\circ}, 40'$ was taken as the dividing line. Down to that dividing line, by this treaty, the sovereignty of Russia was recognized as complete and perfect; and south of that boundary, the sovereignty of Russia was excluded by her agreement not to make any more settlements south of it. In the course of this whole discussion, no pretension was ever made by either Great Britain, or the United States, to any trade in these Bering Sea regions, or to any interests in these regions at all.

Great Britain and the United States made no assertions of any interest in these regions of Bering Sea at all. They had none at that time. Everything embraced by those regions was in the undisputed possession of Russia. There was no desire to interfere with it, and, consequently — this was the conclusion of Mr. Blaine. —

The President. You speak of the coasts only.

Mr. Carter. Well, I speak of the sea as well. I am giving Mr. Blaine's argument now.

Lord Hannen. It is not yours — you do not adopt it?

Mr. Carter. I am not *now* adopting it. Whether I will adopt it or not, and how far I adopt it, will be the subject of debate. But

this is his argument, that all the pretensions of Russia, whether upon the sea, or upon the land, North of the 60th degree, and including all the islands in Bering Sea and peninsula of Alaska which constituted the Southern boundary of Bering Sea, were recognized as the undisputed possessions of Russia, and no contention was made in reference to them.

Sir Charles Russell. North of 54°, 40' you mean?

Mr. Carter. No : north of 60°, I mean, at the time when the protests were made, and the negotiations were entered into. Everything North of 60° was undisputably the property of Russia, and no contention was made on the part of either Government in reference to it. The region of controversy was south of that, between that, and latitude 54°. The whole controversy was in reference to that region, and the adjustment affected that region alone. It did not affect, and was not designed to affect—it could not have affected—the undisputed part of the territory. So the final conclusion of Mr. Blaine was that the pretensions of Russia asserted by the ukase of 1821, so far as respected Bering Sea and the islands in Bering Sea, and so far as respected land and water both, were unaffected by the treaties of 1824 and 1825, and therefore they stood not only unaffected by those treaties, but, because they were left unaffected by those treaties, admitted by those two powers to be valid and legitimate. That is his argument.

How far that argument may be sound, and where it may be weak, if it is weak at all, will form the subject of a brief discussion, upon which I shall enter at a subsequent stage. I am now merely presenting the argument contained in this letter of Mr. Blaine's.

The controversies between these diplomatists kept varying, all along during this correspondence, sometimes discussing the real questions in the controversy, and sometimes discussing the question which party was responsible for the delays and difficulties which attended the progress of the negotiations. A letter of the latter character, found on page 240, I will next notice.

This is a letter from Mr. Blaine to Sir Julian Pauncefote, and is designed to be an answer to Lord Salisbury's note which I have heretofore read, in which he endeavored to throw off from the shoulders of Great Britain the responsibility for the delays which had occurred in the negotiation and which succeeded the abortive attempt between Mr. Phelps and Lord Salisbury. I am not going to read that letter either.

The President. You mean the failure of the draft convention?

Mr. Carter. No : I mean the general failure from the beginning. You will remember that Mr. Blaine had written a note to

Sir Julian Pauncefote marked by something of acerbity, in which he complained of the delays and difficulties attending the settlement of this question, chargeable upon the conduct of Great Britain, and mainly occasioned by the fact that Great Britain was constantly governing her action according to the views and wishes of Canada. Of course whatever may be the necessities, the difficulties, attending the settlement of a diplomatic controversy on the part of a power like Great Britain — and I can easily see that there are very serious difficulties attending such a settlement — another power finding that the Government with which it is dealing is governed in its own action by the wishes, real or supposed, of one of its dependencies, will naturally come to feel some uneasiness : and that was the feeling in which Mr. Blaine had written his letter ; and he had again referred to the period when Mr. Phelps communicated his original proposition to Lord Salisbury, which was promptly accepted by Lord Salisbury under circumstances which led the Government of the United States to suppose that the final determination of the controversy was at hand. He had referred to the fact that the negotiations were first interrupted, then suspended for a long time, then finally retired from in consequence of the action of the Canadian Government. Lord Salisbury undertook to defend the British Government from those charges. This is the reply of Mr. Blaine designed to show that that defence was not a sufficient one, and that his original complaints of delays were well founded.

On the second of August, 1892 (page 242 of the American Appendix), Lord Salisbury having succeeded in drawing Mr. Blaine into a controversy respecting these Russian pretensions and the effect of the Treaties of 1824 and 1835 respecting them, and having received Mr. Blaine's argument upon that point, replies to it at great length. The reply commences on page 242 and extends with its notes to page 263. Of course it is wholly impracticable to read it here, and all I can do, and all it is necessary to do, is to briefly summarize it.

Lord Salisbury's argument is this : That the publication of the ukase of 1821 was the first notice which Great Britain had ever received, or other Governments had ever received, of any pretensions by Russia over the waters of Bering Sea and over the Northwest Coast. He states that the pretensions of Russia made by that ukase were to a sovereignty over the waters from Bering Straits down to latitude 51° on the American shore, and down to latitude 47° on the Asiatic shore, thus asserting a sovereignty, not only over Bering Sea, but over a large part of the ocean south of that sea : and he insists that the principal point of the objection of Great Britain to this pretention on the part of

Russia was, not the matter of sovereignty on the Northwest Coast which Mr. Blaine conceived it to be, but the assertion of maritime dominion over the high seas. He insists that that was the principal point complained of by Great Britain ; and he says that that was squarely abandoned by the treaty concluded between Russia and Great Britain in 1825 ; that the principal assertion was one of complete dominion over the sea, and that that assertion was abandoned by the express terms of the treaty. I now read from the first article of the treaty between Great Britain and Russia of 1825, which is found on page 39 of the first volume of the Appendix to the American Case, for the purpose of showing what the argument of Lord Salisbury was. That first article is :

I. It is agreed that the respective subjects of the high Contracting Parties shall not be troubled or molested, in any part of the ocean, commonly called the Pacific Ocean, either in navigating the same, in fishing therein, or in landing at such parts of the coast as shall not have been already occupied, in order to trade with the natives, under the restrictions and conditions specified in the following articles.

Mr. Blaine's argument had been that the words « Pacific Ocean » as used in that first article of the treaty did not include Bering Sea, but only the ocean south of that sea. Lord Salisbury's argument now is that Pacific Ocean did include the whole of Bering Sea ; and the controversy between those two diplomatists, now became substantially confined to that particular point, whether the term « Pacific Ocean », as used in the first article of the treaty between Russia and Great Britain, and the similar term of the first article of the treaty between Russia and the United States, was really intended to embrace Bering Sea, or only the waters south of that sea. This debate upon the question of the pretensions of Russia came finally to concentrate itself very much upon that particular point, and Lord Salisbury's argument was a very full one, designed to show that Pacific Ocean was intended to include the whole of Bering Sea.

The President. Mr. Carter, I must call your attention to this fact, that the original text is a French text and that what you read was the English version, which is not of an official character. There is a certain difference which I remark in the French text and in the English text, or in the English version which you have read.

Mr. Carter. When I come to the discussion of the question. —

The President. You do not discuss that at present ?

Mr. Carter. No. When I come to discuss the merits of the question I will say something as to the text of the treaty which we must accept in our discussions. At this point, unless the learned

President thinks there is something particularly material about it, I will not discuss it.

The President. Your translation bears only on the ocean commonly called the Pacific Ocean. I think that would be quite material.

Mr. Carter. Those considerations have relation to the merits of the controversy: and when I come to discuss the merits I will say something upon that point; but I will not discuss it now. I wish now to speak of this letter of Mr. Blaine to Lord Salisbury on the 17th of December, 1890. This letter will be found at page 263. He re-iterated his positions there in a very long letter, a letter written, I venture to say it will be admitted, with very great ability, sustaining his contention that the term Pacific Ocean did not include the Bering Sea. At this time Mr. Blaine, gradually becoming more and more interested in this discussion, and giving, I suppose, more and more attention to it, became more and more convinced of the solidity of the ground upon which he stood, and seemed to be almost ready to surrender every other ground in the case and put the issue of the controversy upon this. He was not very cautious in that particular, and allowed an expression to fall from him which the quickness of my learned friend Sir Charles Russell seized upon the other day. It is dated the 17th of December, 1890, and in it he says this:—

Sir Charles Russell. Are you going to read this at length?

Mr. Carter. No, I am not.

Sir Charles Russell. If so, it will be necessary to read the others.

Mr. Carter. Oh no: far from it. I am only going to read a few lines. This is the passage to which I designed to call the attention of the arbitrators:

If Great Britain can maintain her position that the Behring Sea at the time of the treaties with Russia of 1824 and 1825 was included in the Pacific Ocean, the Government of the United States has no well-grounded complaint against her. If, on the other hand, this Government can prove beyond all doubt that the Behring Sea, at the date of the treaties, was understood by the three signatory Powers to be a separate body of water, and was not included in the phrase "Pacific Ocean", then the American Case against Great Britain is complete and undeniable.

The extraordinary thing in that observation and what I desire to call to the attention of the learned arbitrators is this: Mr. Blaine in his first note to Sir Julian Pauncefote stating the position which the United States took in reference to this controversy and the grounds upon which it based its claims to prohibit pelagic sealing in Bering Sea, dismissed from consideration altogether this question of Russian authority and Russian pretensions, or any right derived by the United States from Russian authority or Rus-

sian pretensions. He then proceeded to put the controversy upon grounds of essential right, setting forth the lawful and useful character of the industry carried on by the United States upon the Pribilof Islands — an industry useful to themselves and useful to mankind — setting forth the destructive nature of pelagic sealing as carried on by these Canadian sealers and its indefensibility upon moral grounds, that it was an indisputable wrong, and, being injurious to property interests of the United States, that the latter power was clothed with full authority to prevent the commission of that wrong. Those were his grounds. Here, somewhat incautiously, he has abandoned that view, and chooses to say now that if the Government of Great Britain can maintain her position in respect to the meaning of "Pacific Ocean", then the United States has no well grounded complaint against her.

Senator Morgan. Mr. Carter, if you will allow me the interrupt you just there, I think Mr. Blaine deserves some vindication.

Mr. Carter. I am going to vindicate him.

Senator Morgan. I hope you will. On the 29th day of April 1890, preceding by several months this letter from which you have been reading, written by Mr. Blaine, the British Government, through Sir Julian Pauncefote, sent to Mr. Blaine a draft convention, from which I will read the preamble :

The Government of Russia and of the United States having represented to the Government of Great Britain the urgency of regulating by means of an international agreement the fur-seal fishery in Behring sea, the sea of Okhotsk and the adjoining waters for the preservation of the fur-seal species in the North Pacific Ocean.

Making a distinction there between Bering Sea and the Sea of Okhotsk and North Pacific Ocean. I will not read the whole preamble, but it seems to me that Mr. Blaine had at the time he wrote the letter upon which you are commenting an acknowledgment from the British Government that there was a distinction between the Bering Sea and the Sea of Okhotsk and the North Pacific Ocean; but I think he was not quite out of the line of reason, to say the least of it, in claiming that there was a distinction which had been maintained perhaps for many years.

Mr. Carter. It may be that the British Government had acknowledged the difference of the character in question; but I hardly think the Government of Great Britain intended to acknowledge any such difference as that. I do not so interpret it. But, in the next place, whether they acknowledged it or not, I think it was—if I may be so bold as to offer a criticism—I ought, perhaps, not to—but nevertheless it seems to me it was — a piece of imprudence in Mr. Blaine to abandon the ground which he at first assumed, in consequence of the confidence which he felt in the new position he was

taking upon this question of the pretensions to Bering Sea. He might have argued the question of the rights of the United States as acquired from Russia. It would not have affected that argument at all. There was no occasion whatever for an apparent abandonment of the ground which he had already taken in his first letter to Sir Julian Paucefote.

Singularly enough, however, in this very same letter, towards the end of it, he again re-asserts his original ground. Near the close of the letter, in the last paragraph on page 286, Mr. Blaine thus writes :

The repeated assertions that the Government of the United States demands that the Behring Sea be pronounced *mare clausum*, are without foundation. The Government has never claimed it and never desired it. It expressly disavows it. At the same time the United States does not lack abundant authority, according to the ablest exponents of international law, for holding a small section of the Behring Sea for the protection of the fur seals. Controlling a comparatively restricted area of water for that one specific purpose is by no means the equivalent of declaring the sea, or any part thereof, *mare clausum*. Nor is it by any means so serious an obstruction as Great Britain assumed to make in the South Atlantic, nor so groundless an interference with the common law of the sea as is maintained by British authority to-day in the Indian Ocean. The President does not, however, desire the long postponement which an examination of legal authorities from Ulpian to Phillimore and Kent would involve. He finds his own views well expressed by Mr Phelps, our late minister to England, when, after failing to secure a just arrangement with Great Britain touching the seal fisheries, he wrote the following in his closing communication to his own Government, September 12, 1888 :

Much learning has been expended upon the discussion of the abstract question of the right of *mare clausum*. I do not conceive it to be applicable to the present case.

Here is a valuable fishery, and a large and, if properly managed, permanent industry, the property of the nations on whose shores it is carried on. It is proposed by the colony of a foreign nation, in defiance of the joint remonstrance of all the countries interested, to destroy this business by the indiscriminate slaughter and extermination of the animals in question, in the open neighboring sea, during the period of gestation, when the common dictates of humanity ought to protect them, were there no interest at all involved. And it is suggested that we are prevented from defending ourselves against such depredations because the sea at a certain distance from the coast is free.

The same line of argument would take under its protection piracy and the slave trade when prosecuted in the open sea, or would justify one nation in destroying the commerce of another by placing dangerous obstructions and derelicts in the open sea near its coasts. There are many things that can not be allowed to be done on the open sea with impunity, and against which every sea is *mare clausum*; and the right of self-defense as to person and property prevails there as fully as elsewhere. If the fish upon Canadian coasts could be destroyed by scattering poison in the open sea adjacent with some small profit to those engaged in it, would Canada, upon the just principles of international law, be held defenseless in such a case? Yet that process would be no more destructive, inhuman, and wasteful than this.

If precedents are wanting for a defense so necessary and so proper, it is because precedents for such a course of conduct are likewise unknown. The best international law has arisen from precedents that have been established when the just occasion for them arose, undeterred by the discussion of abstract and inadequate rules.

I have the honor to be, sir, with the highest consideration, your obedient servant,

JAMES G. BLAINE.

The learned arbitrators will there perceive that he comes back to his original ground and puts the case upon the question of property, and of essential right, and of a right to defend property interests on the high seas against acts which are themselves *contra bonos mores*. I am obliged to admit that these two attitudes taken by Mr. Blaine in this letter, one at the beginning and the other at the end, are inconsistent and self-contradictory : but it is, nevertheless, true that, inasmuch as the last attitude is taken at the end of his letter, the position of the United States as heretofore assumed was not by this letter, as it never had been by any other, substantially, or in any respect indeed, changed.

Lord Salisbury had the last word on this subject. He rejoined to Mr. Blaine in a letter dated February 21, 1891.

Sir Charles Russell. That is comparatively short.

Mr. Carter. Comparatively short, but not short enough for me to read. Nor is it necessary for me to describe it, or to say anything of it, except that it was a reiteration of his original positions and a respectful statement that the argument of Mr. Blaine on the other side was not satisfactory ; closing, I believe, as is usual, with these polite gentlemen, with some conciliatory observations, and also containing some discussion of the points of the proposed arbitration ; for the arbitrators will remember that while this discussion upon the merits of the controversy was going on, another discussion was also going on between the parties, *pari passu*, concerning the features of the arbitration, towards which the correspondence and the negotiation were gradually tending. There was a good deal of correspondence after this, but it contains very little — nothing — which imports into the controversy any special new feature which it is important for me to bring to your attention at this time. The debate was exhausted ; the disputants had stated their views, and they had not approached an agreement at all upon any of the questions in controversy. The necessity for some mode of adjustment in order to prevent a very lamentable result became more and more apparent to each party, and approaches were gradually made to a final agreement for an arbitration. Much discussion took place in reference to the points which should be submitted ; but there was not very great difficulty experienced in coming to an agreement. The remaining discussion, therefore, embraces the controversy concerning the shape which the arbitration should take, and all it is necessary for me to say in reference to it is this : As finally agreed upon it still presented its original aspect of a scheme with two alternative features, one contemplating that there should be a mixed commission of experts which should make inquiries in relation to seal life and pelagic sealing, and as to what regulations were necessary to preserve the

seals, and report upon that; that if the two Governments upon receiving that report should find themselves able to agree upon a scheme of regulations, the arbitration would become unnecessary. That was not expressed, but it was an implied feature all along. It was borrowed from the original suggestion of Sir Julian Pauncefote. But if there was a failure to agree, then, of course, it would be necessary that the arbitration should proceed, and when it did proceed, that it should embrace all the questions in relation to the original pretensions of Russia, and to the rights which the United States may have derived from Russia grounded upon those pretensions; next the question of the property interest of the United States in the seals, and in the industry which was maintained in respect to that animal upon the Pribilof Islands; and then, if the determination of the Tribunal upon those questions which are properly called by my learned friend Sir Charles "questions of right", should leave the subject in a condition where the concurrence of Great Britain was necessary to the establishment of regulations for the preservation of the fur-seal, the arbitrators should consider what regulations were necessary.

The President. In that contingency?

Mr. Carter. In that "contingency", yes; and only in that contingency. The duty of the arbitrators is most plainly specified here as to what they are to do, and the times at which they are to do it. The question of what evidence they are to act upon, and when that is to be submitted, has already been argued; and I shall say nothing further about it.

When the parties were brought to a substantial agreement upon these points, the agreement for the arbitration, and the agreement for the mixed commission of experts, were drawn up separately and signed separately on the 18th of December, 1891; and, in accordance with the design of settling the matters by a convention upon the basis of a joint report the Commissioners were at once appointed on the part of Great Britain and proceeded to Bering Sea for the purpose of making their investigations long before the treaty was finally drawn up and signed; but in February, 1892, these two agreements, thus far kept separate, were finally consolidated in the treaty, and the treaty was signed and ratified.

That concludes the second stage of the controversy.

In a word or two, allow me to recapitulate the principal features of this second stage of the controversy. It opens with the acts of the administration of President Harrison; proclamations designed to prohibit pelagic sealing, instructions to cruisers to enforce the law; seizure of British vessels and consequent renewal of protests by Great Britain. Next the consideration by President Harrison and his Secretary of State, Mr. Blaine, of the grounds upon which

the United States defended their action in making these seizures upon Bering Sea, and the setting forth of those grounds in their full extent.

The next step in this stage was a renewal of the negotiation for a settlement between the two Governments, the proposal of Sir Julian of a draft convention, which contained the germ of a qualified and limited arbitration; next the answer of Lord Salisbury to the arguments upon which Mr. Blaine had defended the conduct of the United States, and an attempt by him, as I have styled it, — perhaps that will not be agreed to by my learned friends on the other side — but an attempt, as I think, to avoid a discussion of the grounds upon which Mr. Blaine had undertaken to defend the position of the United States. Next the introduction of this matter of Russian pretensions in Bering Sea; the Ukase of 1821; the treaties of 1824 and 1825; and this question of what was meant by, and how much was included by, the phrase “ Pacific Ocean ”, as it is used in both those treaties. Next the carrying forward of the proposal for arbitration and the reduction of the suggestion of a joint commission to distinct points, and, finally an agreement in reference to them; and at last a consolidation of the agreements into the treaty, creating this arbitration; the signing of that treaty, and its ratification by both powers.

There is still another stage, but it is a very short one and briefly told. That is the *third* stage of the controversy, and has reference to the *action* of the two Governments *under* the treaty. The Commissioners were appointed upon both sides. They visited Bering Sea. They examined the condition of the rookeries there. They made such investigations as they chose to make, and were able to make, concerning seal life. They, or some of them — the British Commissioners, at least — went over to the sealing islands of Russia on the Asiatic shore, and they examined the business of pelagic sealing, its nature, its tendencies, etc. The two sets of Commissioners came together; they attempted to agree; but they found themselves unable to agree, except in one or two limited conclusions. They were agreed in this, that the numbers of the herd of seals which made its home upon the Pribilof Islands were in the course of diminution; that such diminution was cumulative, that is, it was increasing, and that it was in consequence of the hand of man. There they stopped, and were unable to go any further. What the causes were which prevented them from being able to go any further in harmony are to my mind very plain, but this is not the moment at which I should state that. It is enough for the present purpose to say that upon all other matters they disagreed, and therefore the hopes of the two Governments of being able

to unite in a convention in respect to regulations based upon an agreeing joint report of these commissioners, were disappointed, and it became necessary that the arbitrators should be called together. This disappointment of hopes occurred a considerable period before the time when any step was requisite in reference to the arbitration by either party. But this failure having occurred the arbitrators were appointed. The parties proceeded to frame their Cases and their Counter Cases and to exchange them, and to prepare their arguments for submission to the Tribunal; and here we are.

That, gentlemen, is, as well as I can state it, a concise account, although it has been a rather long one, of the various stages of this controversy, and I hope it will have tended in some degree to enable you to view the controversy in the lights in which, from time to time, the parties themselves have viewed it; and, therefore, to understand the precise questions which arise, the precise difficulties which are presented, better than you otherwise would.

I shall, therefore, proceed with the next step in the argument of the Case.

Senator Morgan. Mr. Carter, before you proceed, will you allow me to call your attention to some dates about which, possibly, there is some misunderstanding. I understand that these commissioners were in fact appointed before any convention was signed.

Mr. Carter. Yes.

Senator Morgan. They entered upon their work and completed it so far as the investigation was concerned, before any convention was signed; and when they made their report a convention had been signed, but it had not been ratified by either Government, and ratifications had not been exchanged.

Mr. Carter. I am not able now to say what the fact was in that particular as to dates.

Senator Morgan. I desire to present that, because it is in my judgement an important fact. I know it is a fact because the record shows it.

Mr. Foster. They adjourned on the 4th of March, and the convention was ratified by the Senate on the 29th of March.

Senator Morgan. The Commissioners completed their labors making their joint report and a separate report to each Government before the Senate of the United States acted upon that convention, and before ratifications were exchanged.

Mr. Carter. I believe that to be so, but I have not the dates.

Senator Morgan. Therefore, there was no treaty at the time they made that report.

The President. But there was an arrangement between the Governments — precisely the arrangement which was signed afterwards, on the 18th of December, 1891. There was an arrangement made in June, 1891, if I remember, which you read us a few days ago, an arrangement in seven articles, providing for the joint commission to be sent out. That was not signed but it was an arrangement between the Governments. It was not signed or ratified, since it had not been submitted to the American Senate.

Senator Morgan. The President does not seem to apprehend exactly that no arrangement made between the diplomatic functionaries of the United States and any other Government of the character mentioned here, has any effect whatsoever upon the laws of the United States until it has been ratified by the Senate; and the ratification took place not only after the arrangement was made, but after the report was made.

The President. The 7th of May, 1892..

Mr. Justice Harlan. The separate report of the British Commissioners was made June 1st, 1892, and the exchange of ratification occurred May 7th, 1892.

Senator Morgan. I refer to the joint report, after which, as I understand it, the Commission, as a Commission, was dissolved. And each of the Commissioners went on, whether rightfully or wrongfully, I am not prepared to say, to make subsequent thereto, their separate reports to their respective Governments.

The President. That is perfectly correct.

Mr. Carter. The statement by the learned Arbitrator is entirely correct.

Senator Morgan. The Commission finally adjourned on the 4th of March. The ratification of the treaty was had on April 22d.

Mr. Justice Harlan. The ratification?

Senator Morgan. The ratification by the Senate.

Mr. Foster. It was proclaimed May 9th.

Mr. Carter (reading). " Concluded at Washington, February 29th, 1892; ratification advised by the Senate, March 29th 1892; ratified by the President, April 22d, 1892; ratifications exchanged, May 7th, 1892; proclaimed, May 9th, 1892 ". That is on the first page of volume I of the Appendix.

Senator Morgan. It was proclaimed by the United States as an amended treaty, putting the treaty as originally ratified by the Senate and the *modus vivendi* which came in as a supplementary treaty or an amendment of a former treaty together, and constituting one instrument to be construed in *pari materia*.

The President. That had no legal force, I suppose, before it was proclaimed in the United States.

Mr. Carter. None at all. It could not have had, either in Great Britain or the United States.

Mr. Phelps. There were also other amendments added by the Senate.

Senator Morgan. There were two amendments of a distinct character, each to a subject not entirely foreign to, but independent of, the *modus vivendi*.

Mr. Carter. In the view I had taken of it, the circumstances under which this Commission was appointed and proceeded to its labors prior to the ratification of the Treaty, is not of material importance.

Senator Morgan. May be not.

Mr. Carter. In the view I take of it, it may, or may not, be that that action was illegal. Whatever the truth is, however, this must be true — that the diplomatic representatives of the Governments had come to a formal agreement that this should be done. They had come to an agreement also in writing that this should be done, although that writing was not in a form making it a treaty. That is plain enough. It was highly important that all of this preliminary work should be done as soon as possible. It was necessary in order to carry out the scheme contemplated by the treaty. It was all done by the parties in good faith, and I should hope that it would be allowed to be considered as having effect according to the intent of the parties. I should, indeed, myself be inclined to argue that the ratifications having been exchanged between the Governments with full knowledge that these proceedings had already been had beforehand, and that it was the design of the pending treaty that they should be had, that the ratifications of the treaty would have an effect, as we lawyers say, by *relation*, and go back and make good these prior proceedings which otherwise might have been invalid.

Senator Morgan. If the learned counsel will allow me, that is precisely the view I take of the matter, that the subsequent ratification of these treaties, whether there are two or whether there is one, relating to the action of the Commissioners authorized by that diplomatic correspondence, is an adoption of what those Commissioners had done; but that operates upon what they had done, as I conceive, and it did not operate to give them any authority *in futuro*.

Mr. Carter. Oh no; I should suppose not. But the view which is suggested by the learned Arbitrator is entirely in accordance with my own.

I now pass to the next matter which, as it seems to me,

in the order I have prescribed, it is proper for me to consider.

This also is a question, somewhat preliminary to the argument of the main questions in controversy, but upon which it seems to me important that I should address a few observations to the Tribunal; and that question is as to the *law* which is to govern it in its deliberations.

This is a Tribunal composed of the citizens of different nations, part belonging to the nations between whom the controversy subsists, and part coming from other nations. They are sitting under no municipal law whatever. The authority of the courts of Great Britain, the authority of the courts of the United States, as authority, are as nothing here. This is an international Tribunal. Then, too, there is no international legislature which has adopted any law in relation to these or any other subjects which can be administered or applied. Therefore, in a certain sense, and in the sense in which we speak of law when we are engaged in a controversy before municipal tribunals, there is no law at all. Yet we cannot suppose that questions of this sort are to be discussed, debated, and determined by this Tribunal, without its being bound by some rule or some system of law. What then *is* the *law* which is to govern us? I suppose I might appeal with entire confidence to the conscience and the immediate conviction of each one of the members of this Tribunal, that the decision of the controversy is to be governed by *some rule of right*. What that particular rule may be, where it is to be sought, is another question; but the decision is to be governed by some rule of right. I heard with infinite pleasure my learned friend, Sir Charles Russell, upon one occasion when he was addressing you, say that the first five questions mentioned in the treaty were what he might properly enough call, he thought, *questions of right*, and that they were questions of right which must be decided by the members of this Tribunal as *jurists*. I concur in that view of those questions thus taken by him and anticipate, indeed, that it will never be receded from by him. How else could it be? This is called an arbitration; but very plainly it is not an arbitration of that character which very frequently takes place between man and man. Oftentimes in controversies between individuals it is of far higher importance that the particular controversy should be in some manner settled and the parties left at peace, than *how* it shall be settled; and therefore in such cases the decision is often reached by some reciprocal process of concession, giving a little on one side and conceding a little on the other, and so on, until finally an agreement is reached without a resort to any particular principle. That is not the way to deal with this controversy. It is of a totally different character. If it could have been disposed of by mutual

compromise and concession it would never have been brought before this Arbitration. The parties themselves could have settled it. They are quite competent to say how much they will be willing to yield, in order, by mutual compromise and concession, to finally reach a point upon which they are willing to agree. But the difficulty in this case is that the parties were in difference in respect to their *rights*, and they could never come to an agreement upon them. They differed as to the question of the powers a nation may exercise upon the high seas in defence of its admitted rights of property in time of peace. They differed on the question whether the United States has a property interest in these seals, and in the industry which has been carried on in respect to them on the Pribilof Islands. Those differences they have never been able to reconcile. At variance with each other in respect to them at the start, subsequent discussion between the two parties has had the effect only of more widely separating them; and it is that controversy upon those questions of right which they have committed to your decision.

It is a question, too, necessarily of *right*. Why should they have called together a tribunal constituted of eminent jurists from several distinct nations unless they intended that the rules of *right* should be applied to it. Why should they have made a provision for counsel supposed to be learned in the law, and learned in the fundamental principles upon which the law is founded, unless they supposed it was necessary to bring to the tribunal considerations of *right* in order to enable them to make a decision. Indeed, how could counsel address this Tribunal unless it was supposed that there was a standard of *right*, acknowledged both by the Tribunal and the counsel who address it, to which they could appeal and upon which they could endeavor to persuade the Tribunal. It is therefore very clear, as it seems to me, that the decision of this Tribunal is to be governed by some rule such as we understand to be a rule of *right*. Any other rule, I assume, would not be satisfactory to either party. It certainly would not be satisfactory to the United States. I think I may safely say that, however valuable this seal herd may be to the Government and to the people of the United States, a decision affirming their full and exclusive right to it made by this Tribunal, unless it were made upon *grounds of right*, would not be acceptable. It is of far greater importance to the United States, as it must be to every nation, that the decision of any controversies to which it may be a party should be determined upon principles of right, than it is to gain any mere temporary advantage not based upon such principles.

There is another consideration : The principles which are involved in the controversy affect the most permanent, enduring,

and wide-spread interests. Certainly nothing can be more important than a determination of the question of the power which one nation may exercise against the citizens and the property of another nation upon the high seas in time of peace. This is a question — some aspects of it well enough settled, but other aspects of it quite novel — requiring additional exploration, additional elucidation, and additional determination. It is a question of the gravest and most important character; upon which differences of opinion may arise likely to embroil nations in hostilities and to break up the peace of the world. Then, again, that other question, the circumstances under which a nation may assert a right of property in animals that resort to the seas for a greater or less time during the year, and therefore an animal which at different times may place itself under the power of citizens belonging to different nations of the earth; what question of greater importance can there be than that which involves the principles upon which such conflicting claims may be resolved — the fundamental principles upon which the institution of property stands?

These are questions, the permanent importance of which far outweighs the particular interests of the contending parties to this controversy; and I must therefore express the hope that they will be settled as my learned friend says they ought to be settled, by this Tribunal, looking to them as jurists, and feeling the responsibilities of jurists. The judgment awaited from this Tribunal will be, or ought to be, a monument, or rather an oracle, to which present and future times may appeal as furnishing indisputable evidence of the law of the world.

Therefore, I think myself justified on this occasion in appealing to each member of this Tribunal — I think it is not unbecoming in me to make that appeal — to discharge and dismiss from his breast every sentiment of partiality, and even of patriotism, and to look upon this question as if he were a citizen, not of this country, or of that country, but a citizen of the world, having in charge, and having only in charge, the general interests of mankind. The promptings of patriotism, everywhere else to be heeded, should be silenced here, and nothing should be obeyed except the voice, the supreme voice, of justice and the law.

But while it is to be a rule of right that is to govern the determination of this Tribunal, what *is* that rule of right, and *where* is it to be found? In saying that it is to be a rule of right, it is assumed — it is indeed declared — that it must be a *moral* rule; that is to say, it must be a rule adopted by the moral sense; for there are no rules of right except moral rules. Right and wrong have to do with morality and with morality alone. The law, whether it be international law, or municipal law, is but a part of the general

domain of ethics. It may not include the whole of that domain, but the centres of each system coincide, although the circumference of one may extend beyond the circumference of the other.

When I say that this must be a moral rule, that is to say, a rule dictated by the moral sense, I do not mean, of course, that it is the moral sense of any individual man, or of any individual nation, because there are differences in the moral convictions of different men and of different nations. It is a controversy between nations. We cannot apply to it the moral standard, either of one, or of the other, or of any particular nation. Where, then, can we find it? I submit to you that we must find the rule in that general moral standard upon which all civilized nations and the people of all civilized nations are agreed. We cannot take the opinions of one; we cannot take the opinions of another. We must take that standard upon which all civilized nations are agreed; and that there is such a standard there can be no manner of doubt. This whole proceeding would be out of place if there were not. I could not with any propriety or relevancy stand up and address an argument to this Tribunal unless there was some agreed standard between it and me to which I could appeal, and upon which I can hope to convince. There is, therefore, an agreed standard of morality and of right, of justice and of law, agreed upon among all civilized nations and among the people of all civilized nations. It is just as it is in municipal law. There is a standard there. When controversies are brought before a municipal tribunal, it is most generally the case that there is no particular statutory law which governs the decision; and it is very often, and perhaps generally, the fact that there is no particular prior decision, or precedent, which will serve as a rule of decision; and yet the courts make a decision.

How do they reach it? It is because the judges of municipal tribunals are judicial experts; whose business it is to ascertain the general standard of justice of their own country and to apply it to the controversies which are brought up before them. The general standard of justice in a municipal society is so much of the general rules of morality and ethics as that particular society chooses to enforce upon its members. So, also, in the larger society of nations, there is a similar rule. There is a general international standard which embraces so much of the principles of morality and ethics as the nations of the world agree shall be binding upon them. That is international law, founded upon morality, founded upon that sentiment of right and wrong implanted in the breasts of men wherever they are. It is this alone which enables them to engage in society with each other; it is this alone which enables them to live at peace with each other; and, therefore, the

rule which this Tribunal is to adopt is the general standard of justice recognized by the nations of the world, which I conceive to be only another term for international law.

The President. Mr. Carter, if you please, we will continue to-morrow.

Before rising, I beg leave to state that the Tribunal intends taking a somewhat longer recess to-morrow. It will take its recess from one o'clock until two, which is an exception to our usual practice.

[The Tribunal thereupon adjourned until to-morrow, April 14, 1893, at 11.30 o'clock a. m.]

NINTH DAY, APRIL 14TH, 1893.

[The Tribunal met pursuant to adjournment.]

The President. Mr. Carter, if you will continue your argument we will be pleased to hear you.

Mr. Carter. Mr. President, at the close of the sitting yesterday, I was speaking to the point of what law shall govern the deliberations and the determination of this Tribunal, and I had, in the course of my argument upon that point, undertaken to show that the rule which should govern must be some rule of *right*, and therefore a *moral* rule, founded upon moral considerations; not necessarily the moral rule which governs the jurisprudence of both England and the United States, even if they should happen to coincide upon that point; but that moral rule which is generally recognized by the civilized nations of the world; that general standard of justice, that international standard of justice, which is generally recognized, and which is only another name for international law.

International law, therefore, is the rule which is to govern the deliberations of this Tribunal and to determine its decision. What are the sources to which we are to look for this international law? For the most part international law is derived from, and is determined by, what is called the law of nature, a term very common with the writers on international law. It is called the law of nature, partly because it is a code, so far as it may be called a code, not derived from legislation, having no origin in any legislature sovereign above all nations, — for there is no such legislature; not derived from human institution at all, but founded in the nature of man and in the environment in which he is placed. It is an absolute necessity of human society, without which it could not exist, that there should be a moral rule by which the actions of its individual members in relation to each other should be governed. This is true of all municipal states, and it is equally true of the larger society of nations. There could be no intercourse among nations; there could be no intercourse between individuals of different nations, unless there was some rule, some law, which would be recognized by them and by which their transactions with each other should be governed. And in respect of the great society of nations which is subject to no sovereign power,

that law or rule is, for the most part, what is commonly called the law of nature. This is, indeed, the foundation, not only of international law, but it is the foundation of all law, municipal as well. All municipal codes are but attempts on the part of particular societies of men to draw precepts and rules from the law of nature, and re-enact them for the guidance of its individual members; and in those countries which are not governed wholly by codes or by statutory enactments; in those countries like England and America, where the great body of jurisprudence is unwritten, still the decisions of the tribunals which constitute the sources and the evidence from which the law is ascertained, are derived in great part from the law of nature.

I must fortify what I say in that particular by a reference to some of the highest authorities on this subject. I shall read a quotation from the celebrated disquisition of Sir James MacIntosh on the Law of Nature and Nations. He says :

The science which teaches the rights and duties of men and of states has in modern times been styled "the law of nature and nations." Under this comprehensive title are included the rules of morality, as they prescribe the conduct of private men towards each other in all the various relations of human life; as they regulate both the obedience of citizens to the laws, and the authority of the magistrate in framing laws and administering government; and as they modify the intercourse of independent commonwealths in peace and prescribe limits to their hostility in war. This important science comprehends only that part of private ethics which is capable of being reduced to fixed and general rules.

He thus points out the law of nature as the source of all human jurisprudence, whether municipal or international; and Lord Bacon had before expressed the same truth; he says :

For there are in nature certain fountains of justice, whence all civil laws are derived but as streams, and like as waters do take tinctures and tastes from the soils through which they run, so do civil laws vary according to the regions and governments where they are planted, though they proceed from the same fountain.

This law of nature, as it is styled, is sometimes designated by different terms. Sometimes as natural law; sometimes as natural justice; sometimes as the dictates of right reason; but by whatever name it is described, the same thing is always intended; and it means, in short, those rules and principles of right and wrong, implanted in every human breast and which men recognize in their intercourse with each other, because they are men having a moral nature and are brought into conditions with each other which compel the application of moral rules. I may cite a reference by one of the great authorities which all English lawyers

are compelled to study at the very beginning of their instruction. That is Blackstone. He says :

This law of nature being coeval with mankind, and dictated by God himself, is, of course, superior in obligation to any other. It is binding over the globe, in all countries, and at all times; no human laws are of any validity if contrary to this, and such of them as are valid derive all their force and all their authority, mediately or immediately, from this original. (Comm. Book I, p. 41.)

And the dependency of all law upon the law of nature is very happily and clearly illustrated by those three great maxims which constitute the basis of the jurisprudence of the Roman law, sometimes called the Ulpianic precepts. They amount simply to a reduction to their original form of the dictates of natural justice, or of natural law,—and they are thus familiar to every lawyer : « *Juris præcepta sunt hæc : honeste vivere, alterum non lædere, suum cuique tribuere.* »

Some writers have been sometimes inclined to dispute the authority of this law of nature, on the ground that there is no supreme power capable of enforcing its precepts; that nations are themselves supreme; and being supreme and sovereign there is no power over them; and no power, therefore, to enforce the dictates of this law, as there is a power to enforce the rules of municipal law upon the individual members of a municipal state. But that notion, I think, is a mistake, and has generally been agreed to be a mistake. It does not follow because there is no supreme authority to enforce the dictates of this law that it is any the less binding. There are plenty of considerations which do enforce it. It is enforced, in the first instance, by the sense of right and wrong which dwells in the breasts of nations, as it does in the breasts of individuals. The very sense of obligation is of itself a means of enforcing the law. It is enforced, in the next place, by the public opinion of mankind, which holds to a strict account every nation that undertakes to depart from, or violate, its dictates; and it is enforced, in the next place, by the disastrous consequences which nature herself has ordained and made certain to follow from any disobedience of its precepts. This has been well expressed by a distinguished English writer upon international law. I refer to Sir Robert Phillimore. He says :

It is sometimes said that there can be no law between nations, because they acknowledge no common superior authority, no international executive capable of enforcing the precepts of international law. This objection admits of various answers : First, it is a matter of fact that states and nations recognize the existence and independence of each other, and out of a recognized society of nations, as out of a society of individuals, law must necessarily spring. The common rules of right approved by nations as regulating their

intercourse are of themselves, as has been shown, such a law. Secondly, the contrary position confounds two distinct things, namely, the physical sanction which law derives from being enforced by superior power, and the moral sanction conferred on it by the fundamental principle of right; the error is similar in kind to that which has led jurists to divide moral obligations into perfect and imperfect. All moral obligations are equally perfect, though the means of compelling their performance is, humanly speaking, more or less perfect, as they more or less fall under the cognizance of human law. In like manner, international justice would not be less deserving of that appellation if the sanctions of it were wholly incapable of being enforced.

But irrespectively of any such means of enforcement the law must remain. God has willed the society of States as He has willed the society of individuals. The dictates of the conscience of both may be violated on earth, but to the national as to the individual conscience, the language of a profound philosopher is applicable : " Had it strength as it had right, had it power as it has manifest authority, it would absolutely govern the world ".

Lastly, it may be observed on this head, that the history of the world, and especially of modern times, has been but incuriously and unprofitably read by him who has not perceived the certain Nemesis which overtakes the transgressors of international justice; for, to take but one instance, what an « Iliad of woes » did the precedent of the first partition of Poland open to the kingdoms who participated in that grievous infraction of international law! The Roman law nobly expresses a great moral truth in the maxim, " Jurisjurandi contempta religio satis Deum habet ultorem ". The commentary of a wise and learned French jurist upon these words is remarkable and may not inaptly close this first part of the work : " Paroles (he says) qu'on peut appliquer également à toute infraction des lois naturelles. La justice de l'Auteur de ces lois n'est pas moins armée contre ceux qui les transgressent que contre les violateurs du serment, qui n'ajoute rien à l'obligation de les observer, ni à la force de nos engagements, et qui ne sert qu'à nous rappeler le souvenir de cette justice inexorable. » (Phillimore's International Law, third edition, London, 1879, vol. I, section LX.)

And let me cite another extract which I had noted from Sir James MacIntosh, and from the same disquisition to which I have already referred :

The duties of men, of subjects, of princes, of lawgivers, of magistrates, and of states, are all parts of one consistent system of universal morality. Between the most abstract and elementary maxims of moral philosophy, and the most complicated controversies of civil and public law there subsists a connection. The principle of justice deeply rooted in the nature and interests of man pervades the whole system and is discoverable in every part of it, even to the minutest ramification in a legal formality or in the construction of an article in a treaty. — (Sir James Mac Intosh, Discourse on the Law of Nature and Nations, *sub fine*.)

And Mr. Justice Story says in his book on the Conflict of Laws, Ch. II, Sec. 38 :

The true foundation on which the administration of international law must

rest is that the rules which are to govern are those which arise from mutual interest and utility, from a sense of the inconveniences which would result from a contrary doctrine, and from a sort of moral necessity to do justice in order that justice may be done to us in return.

The same great authority when sitting as a judge in the case of *La Jeune Eugénie*, in the second of Mason's Reports, p. 449, says :

But I think it may be unequivocally affirmed that every doctrine that may be fairly deduced by correct reasoning from the rights and duties of nations and the nature of moral obligations may theoretically be said to exist in the law of nations; and, unless it be relaxed or waived by the consent of nations, which may be evidenced by their general practice and custom, it may be enforced by a court of justice wherever it arises in judgment.

The main foundation of international law is, therefore, the law of nature, and it is a system not evidenced by any written code, but is a body of moral rules. But it is a body of moral rules, at the same time, as to which all men are not absolutely agreed. There are differences in the moral convictions of different men, and there are differences in the moral convictions of the same people and the same nation at different periods of time. Law is a progressive system advancing step by step with human progress, and it is constantly aspiring, as it were, to reach a more complete harmony with theoretical moral rules. We cannot, therefore, in applying international law apply those moral rules which we ourselves may deduce from our study of moral precepts. Others may not agree with us; but still there is a great body of plain and simple moral rules to which all men, and all nations, may safely be presumed to agree, and to that extent we may enforce them. It is, nevertheless, true that in human jurisprudence the actual doctrines which are enforced upon the individuals of a municipal state, or which are yielded to and recognized by nations, do not come up to the elevated standard of the law of nature. That is a system of very high standards, not at all times actually recognized in the practice of men. Where these standards do thus stand above the actual practice of men, what we have to enforce, — as we can enforce only what is agreed upon, — is the rules so far as they are actually recognized.

That truth has been rather strikingly illustrated in the case of the slave trade. Very few enlightened men could be found who would not say that the slave trade was essentially and absolutely wrong. Very few could be found who would not say that it was absolutely contrary to the law of nature; but is it against human law? Few of the nations of the world had, until recently, so far recognized the pure and true principles of natural law as to carry

them out to the consequence of forbidding the slave trade. That question has arisen judicially before several tribunals. It arose in the Supreme Court of the United States, and called for the consideration of Chief Justice Marshall. The question was whether the Supreme Court of the United States could execute a municipal law which declared the slave trade to be piracy as against the citizens of another nation. He held that the slave trade was undoubtedly; against the law of nature, but at the same time, taking into consideration the extent to which the nations of the earth had been addicted to the practice, he said it was impossible to declare that it was against the law of nations; and he, therefore, held that a municipal law of the United States declaring the slave trade to be piracy could not be executed against the citizens of another nation. A similar decision upon similar grounds was made by a distinguished English judge, equally illustrious. I refer to Lord Stowell.

Where, then, are we to look for the other evidence which is to enable us to ascertain what the law of nations is in any particular case? First, let me say, to the actual practice and usages of nations; for the practice and usages of nations must import the points upon which they are agreed; and where the practice and usages of nations speak we need look no further. But the practice and usages of nations speak in but a comparatively few cases. They really cover but a very small part of the questions which arise, and of the still larger number of questions which, by possibility, may arise, and which at sometime or other certainly will arise, in the intercourse of nations. In the municipal law of states the case is otherwise. Particular states have a regular establishment of courts. They employ a regular body of experts called judges. The controversies between man and man are innumerable, and they have been arising for thousands of years. Therefore, the science of justice and the law of nature, so far as it is applicable to the relations between individual men, have been so assiduously cultivated in municipal law that we may say there is scarcely a point which remains still to be determined.

In international law it is otherwise. The points in which nations come into connection with each other, or into collision with each other, are comparatively few, and therefore the occasions for the study, the development and the application of the law of nations have, in the course of history, been comparatively few. For the most part, therefore, when new questions arise we are referred at once to the law of nature, which is the true source upon which the whole system of the law of nations rests; and there we are entitled to look to and to take as law, the plain deductions of right reason from admitted principles, unless we find that those plain deduc-

tions have, somewhere or somehow, not been recognized by the nations of the earth in their actual intercourse with each other.

I desire to read one or two more extracts from writers of eminence upon international law, in corroboration of the views which I have just expressed. I read a passage from Mr. Pomeroy, a distinguished American writer, the head of the law school of the University of California. He says (Lectures on International Law, ed. 1886, ch. I) :

SEC. 29. — (3) What is called international law in its general sense, I would term international morality. It consists of those rules founded upon justice and equity, and deduced by right reason, according to which independent states are accustomed to regulate their mutual intercourse, and to which they conform their mutual relations. These rules have no binding force in themselves as law; but states are more and more impelled to observe them by a deference to the general public opinion of Christendom, by a conviction that they are right in themselves, or at least expedient, or by a fear of provoking hostilities. This moral sanction is so strong and is so constantly increasing in its power and effect, that we may with propriety say these rules create rights and corresponding duties which belong to and devolve upon independent states in their corporate political capacities.

SEC. 30. — We thus reach the conclusion that a large portion of international law is rather a branch of ethics than of positive human jurisprudence. This fact, however, affords no ground for the jurist or the student of jurisprudence to neglect the science. Indeed, there is the greater advantage in its study. Its rules are based upon abstract justice; they are in conformity with the deductions of right reason; having no positive human sanction they appeal to a higher sanction than do the precepts of municipal codes. All these features clothe them with a nobler character than that of the ordinary civil jurisprudence, as God's law is more perfect than human legislation.

The observations of Mr. Pomeroy that these rules have no binding force in themselves as law is not a very correct statement. In my view they have in themselves a binding effect as law at all times and all places; and as Mr. Justice Blackstone says, greater in one sense, at least, than any human law. This view was taken by the Government of Great Britain in a celebrated paper, drawn up, I think, by Lord Mansfield himself, which was a response to a memorial by the Prussian Government, a paper which was pronounced by Montesquieu to be *réponse sans réplique*, and has been generally recognized as a very complete statement. I am reading now from the 12th page of my argument :

“ The law of nations is said to be founded upon justice, equity, convenience, and the reason of the thing and confirmed by long usage. ”

And Chancellor Kent has spoken to the same point with great clearness (Comm., part. I, lect. 1, p. 2-4) :

The most useful and practical part of the law of nations is, no doubt, instituted or positive law, founded on usage, consent, and agreement. But it

would be improper to separate this law entirely from natural jurisprudence and not to consider it as deriving much of its force and dignity from the same principles of right reason, the same views of the nature and constitution of man, and the same sanction of divine revelation, as those from which the science of morality is deduced. There is a natural and a positive law of nations. By the former every state, in its relations with other states, is bound to conduct itself with justice, good faith, and benevolence; and this application of the law of nature has been called by Vattel the necessary law of nations, because nations are bound by the law of nature to observe it; and it is termed by others the internal law of nations, because it is obligatory upon them in point of conscience.

We ought not, therefore, to separate the science of public law from that of ethics, nor encourage the dangerous suggestion that governments are not so strictly bound by the obligations of truth, justice, and humanity, in relation to others powers, as they are in the management of their own local concerns. States or bodies politic are to be considered as moral persons, having a public will, capable and free to do right and wrong, inasmuch as they are collections of individuals, each of whom carries with him into the service of the community the same binding law of morality and religion which ought to control his conduct in private life. The law of nations is a complex system, composed of various ingredients. It consists of general principles of right and justice, equally suitable to the government of individuals in a state of natural equality and to the relations and conduct of nations; of a collection of usages, customs, and opinions, the growth of civilization and commerce, and of a code of conventional or positive law.

In the absence of these latter regulations, the intercourse and conduct of nations are to be governed by principles fairly to be deduced from the rights and duties of nations and the nature of moral obligation; and we have the authority of the lawyers of antiquity, and of some of the first masters in the modern school of public law, for placing the moral obligation of nations and of individuals on similar grounds, and for considering individual and national morality as parts of one and the same science.

The law of nations, so far as it is founded on the principles of natural law, is equally binding in every age and upon all mankind.

And a French writer, Hautefeuille, has spoken to the same point (*Des Droits et des Devoirs des Nations Neutres en Temps de Guerre Maritime*, 1848, vol. I, Translation):

He (God) has given to nations and to those who govern them a law which they are to observe towards each other, an unwritten law; it is true, but a law which He has taken care to engrave in indelible characters in the heart of every man, a law which causes every human being to distinguish what is true from what is false, what is just from what is unjust, and what is beautiful from what is not beautiful. It is the divine or natural law; it constitutes what I shall call primitive law.

This law is the only basis and the only source of international law. By going back to it, and by carefully studying it, we may succeed in retracing the rights of nations with accuracy. Every other way leads infallibly to error, to grave, nay, deplorable error, since its immediate result is to blind nations and their rulers, to lead them to misunderstand their duties, to violate them, and too often to shed torrents of human blood in order to uphold unjust pretensions. The divine law is not written, it has never been formulated in any human language, it has never been promulgated by any legislator; in fact,

this has never been possible, because such legislator, being man and belonging to a nation, was from that very fact without any authority over other nations. and had no power to dictate laws to them.

International law is, therefore, based upon the divine and primitive law; it is all derived from this source. By the aid of this single law, I firmly believe that it is not only possible, but even easy, to regulate all relations that exist or may exist among the nations of the universe. This common and positive law contains all the rules of justice; it exists independently of all legislation, of all human institutions, and it is one for all nations. It governs peace and war, and traces the rights and duties of every position. The rights which it gives are clear, positive, and absolute; they are of such a nature as to reciprocally limit each other without ever coming into collision or contradiction with each other; they are correlative to each other, and are coordinated and linked with the most perfect harmony. It can not be otherwise. He who has arranged all the parts of the universe in so admirable a manner, the Creator of the world, could not contradict himself.

And a learned Dutch writer, Ferguson, has spoken very much to the point, (page 24 of my argument.) He says (*Manual of International Law*, 1884, vol. I, part I, ch. III, sec. 21):

Investigating thus this spirit of law, we find the definition of international law to consist in *certain rules of conduct which reason, prompted by conscience, deduces as consonant to justice, with such limitations and modifications as may be established by general consent, to meet the exigencies of the present state of society as existing among nations and which modern civilized states regard as binding them in their relations with one another, with a force comparable in nature and degree to that binding the conscientious person to obey the laws of his country.*

And I remember, although I have not cited here, the way in which the same question has been regarded by the English philosopher, John Locke, illustrious all over the world, in his treatise on Civil Government. He had occasion to consider what the law of nature is, and he defines it to be that law which men would observe and enforce upon each other if they lived in a state of nature, and without any human government whatever. In such a government as that, he says, and anterior to human governments, men still enforced against each other a law. They could not appeal to any supreme authority to enforce it against others, and the consequence was they enforced it themselves. If the rights of a man living in such a condition were violated, he asserted his rights and defended himself by his own arm. That might be said to be the employment of force and to be held divorced from right; but not quite so. The man who has justice on his side always has a supreme advantage, and, therefore, if there is no supreme authority over him to which he can appeal for justice against his neighbor he may be permitted to enforce it himself, and does enforce it himself. A very large part of the enforcement of that sort of justice still remains among men, notwithstanding the socie-

ties into which they have entered. The right of self-defence is an instance. If I am attacked by a man I have a right to defend myself, and I do so. If a man intrudes upon my property I have a right by my own arm, without appealing to any tribunal, to thrust him off it, and I do so. Those are the same modes of enforcing justice and protecting rights which men would exercise if there were no governments at all. Mr. Locke then deals with the suggestion, which, he says, will be made, that this state of nature is a mere imagination which never has existed, and never is likely to exist, and that consequently it is idle to inquire what rights men would have in a state of nature, or what means they would have of enforcing them. To which he makes the pertinent answer that all princes, kings, and sovereign states are now, and ever have been, and always must be, living in a state of nature, and have no other way of enforcing justice or determining rights than individuals would have if there were no government over them.

These observations all tend to show, and I think, conclusively, show, that there is an unwritten law which is everywhere in operation, and which is perfectly sovereign, to enable us to determine in any given case what the rights of nations are as between each other in respect to property, or in respect to any other relation which may be drawn in question, a law which "though not written upon tables of stone, or promulgated amid the thunders of Sinai, is nevertheless binding upon the conduct and consciences of nations and of men."

When we look to the more particular sources from which are to derive knowledge of that law, I think they are these : First, the actual practice and usages of nations; and these are to be learned from history, in the modes in which the relations and intercourse of nations with one another are conducted, in the acts commonly done by them without objection from other nations, in the treaties which they make with each other — although these should be considered with some degree of caution, for they are sometimes exacted by a more powerful from a weaker nation, and do not always contain the elements of justice. And this practice and these usages are also to be found in the diplomatic correspondence between nations; which assert principles on one side which meet with acquiescence on the other. .

Another source from which we may ascertain the actual practice and usages of nation is from the judgments of those courts which profess to administer the laws of nations, — such as prize tribunals, which are sometimes called international tribunals, although, strictly speaking, they are not such. When these sources fail to discover the rule by which we are to be bound, we

must look to the great source from which all law flows; that is to say, natural law, the dictates of right reason, or what is best termed, perhaps, the law of nature.

Let me call attention to one most useful source to which we may look for ascertaining what the law of nature is, and which is not so commonly pointed out, I think, by writers. I mean to the municipal law. If we want to know what the law of nature is upon any given subject, the municipal law is a prime source of information; and it is so because municipal law is founded upon the law of nature, and has been cultivated in every civilized state, as I have endeavored to point out, most assiduously for a thousand years by learned experts called judges. The efforts of such men extending over such a long period of time, in inquiring and determining what justice is in multitudes of cases, are a mode of cultivating the system of the law of nature. We know what rules are prescribed by the law of nature from the results of their inquiries; and, therefore, when any question of right arises similar to those questions of right which arise in municipal jurisprudence, the municipal jurisprudence of the several states of the world, so far at least as it is concurring, seems to me to be a prime source of knowledge.

And, finally, in all cases where we are to seek a knowledge of the dictates of the law of nature, the authority of the jurists, from Grotius, the great master of the science, down through succeeding writers, to those of the present day — a very numerous body of very illustrious men, given to ethical studies and to a consideration of the great relations of independent states with each other — these constitute a source of information always respected by judicial tribunals.

That, Mr. President, closes what I have to say in reference to the law which is to govern the determination of the Tribunal; and I am happy to believe that upon this branch of the controversy, at least, I am to anticipate no substantial disagreement from my learned friends upon the other side. I think the subject hardly admits of a difference of opinion; and from what has already fallen from some of them, I anticipate a concurrence.

Sir Charles Russell. My learned friend must not assume that.

Mr. Carter. Then let that be considered as unsaid. I am apprised that there may be differences, and I shall listen with some degree of interest to a statement of what those differences are, and to the grounds upon which they may be based.

I now approach the consideration of that question which, in the order adopted by the Treaty, seems properly to be the first to engage our attention. That has reference to the rights which may have

been gained by Russia over the regions in connection with which this controversy has arisen, and the rights which consequently the United States may have derived from the act of cession of the Alaskan territory by Russia to the United States. When I was giving a historical sketch, of the origin of this controversy, I very briefly alluded to the region of Bering Sea and to the early discoveries and acquisitions of Russia in that quarter of the globe. I ought, perhaps, to call attention to some of the details which it was not important for me then to give.

The maritime enterprise and ambition of Russia, withholding its exercise from the more fruitful and agreeable quarters of the globe, were exerted in these high northern latitudes on the coasts of Asia and North America. The discoveries of Russian navigators in that quarter of the globe began at a very early period. As early as 1648 a voyage was made from the Arctic Ocean, from the northern shores of Siberia, around through Bering Straits, and along the eastern coast of Siberia. That was as early as 1648, and at about the same time there was a discovery of the North American continent near the mouth of the Yukon River, on the other side of Bering Sea.

The President. Was not Siberia in possession of Russia?

Mr. Carter. So far as it could be in the possession of any power, I think it can be said that as early as that period it was in the possession of Russia. In the year 1728 Bering made his voyage through the Straits to which his name was afterwards given. He made a second voyage in 1741, and in that voyage he discovered the eastern shore of the Sea, and also a large number of the Aleutian Islands. He discovered also the Commander Islands, which are the breeding place of the Russian seals; and it was upon one of those islands that he was shipwrecked.

This discovery of the Commander Islands by Russia gave them a knowledge of the herd of fur-seals which visited that spot, and enabled them to turn that source of wealth to the benefit of man. During this period, and subsequent to the voyages which I have mentioned, there were other very numerous Russian voyages in Bering Sea and along the Aleutian chain, and in the course of them it was discovered that there were vast bodies of seals at certain periods of the year migrating north, and at certain periods migrating south. Their migrations north were more noticeable, because it is in those migrations that they are more together; and from the knowledge the Russians had already acquired of the habits of seals on the Commander Islands, they had every reason to believe that there was, north of the Aleutian Islands, through the passes of which they saw them taking their course, some remote region which they made their

breeding ground. As I had occasion to state, the discovery of that unknown region was one of the great purposes of Pribilof, an enterprising Russian navigator, and he finally, after many attempts, made the discovery.

The President. You mean to say Pribilof's expedition was mainly designed on account of the seals, — that he, at that period, was looking out for the seals?

Mr. Carter. He was. After that discovery he had been looking out for the breeding place of those seals which he had observed making these migrations to the northward. It was a distinct object with him, and he finally satisfied his ambition and made the discovery.

At a later period, Russian navigators also explored the region south of the peninsula of Alaska, and down as far, certainly, as the 54th degree of latitude, and as the Russian authorities at the time claimed, down as far as the 51st degree of latitude; along this coast (here indicating on the map), which I call the Northwest Coast. When I speak of the "Northwest Coast", without saying more, I mean that particular coast south of the 60th degree of north latitude, and extending down over the whole of the Russian possessions, and of British America.

A few words as to the characteristics of those regions. In the first place, they were one and all absolutely incapable of agriculture. No such pursuit was possible upon them. In the next place, they were at that time almost uninhabited. Scattered tribes of natives, Esquimaux, were to be found nearly as high up as the Bering Straits; and I suppose, also, at other places farther south. Some of the Aleutian Islands were inhabited by native races called Aleutians, and this more southern shore and islands were inhabited to a still greater extent by several different tribes of Indians. On the Siberian coast there were very few inhabitants, I mean in its more northern parts.

As there were no agricultural products, we may ask what other products were there. They were rich in one thing, and in only one thing, and that was fur-bearing animals. There were sea otters, seals, and many other animals, valuable for their skins, and at this early period, that was substantially the only product of these whole regions which was of any value to man. Subsequently, of course, fisheries were developed; but at that early period there was no product of these regions valuable to man except animals, which were valuable on account of their skins.

How could this sole product of that region be gathered and turned to human purposes? It was only by employing the instrumentality of natives who were from time to time engaged in the pursuit of these animals, and visiting them upon frequent, or

upon stated, occasions for the purpose of taking such store of the skins as they had previously gathered, and giving by way of exchange and return such articles as the natives might be in need of. That was the only way in which the only product of these regions could be turned to human account; and that involved the necessity of having trading establishments at various points along the coast, and the furnishing of a certain number of vessels sufficient to carry the subjects of the commerce backwards and forwards. It required, also, the protecting arm of the Russian Government to defend the trading establishments thus formed. Such establishments were principally — and the largest of them — on the islands and shore of this Northwest Coast. There is where the most important of them were first placed. There was at an early period at least one establishment as high to the northward as where the pointer rests now (indicating on map), and perhaps others along that coast; but as I now remember, I think not at that very early period. The Pribilof Islands were not inhabited for a very considerable time after their discovery. They were uninhabited when found. The population finally inhabiting them was carried thither from some of the Aleutian Islands.

Let me, in the next place, remark that according to the ideas of that age and of that time, prior discovery gave to a nation the right and title to the new regions which it had discovered. Ever since the discovery of Columbus had revealed to the European nations the existence of a new world, the ambitions of the different nations of the world, or of many of the different nations of the world, were greatly excited in turning these various discoveries to account. There were likely to be, and there were, as we know from history very well, conflicting claims arising out of an asserted priority of right; and those conflicting claims were often the subject of discussion between different Governments. It was necessary that some rule should be established by which priority of right should be determined; and the rule eventually established was the one which men would necessarily recognise if there was no other thing to give priority, — and that was priority of discovery. That came to be universally recognized as a just foundation for a right. If, indeed, the prior discovery were subsequently abandoned, it might go for nothing; but unless it was abandoned, if discovery had been made, if an assertion of title had accompanied it, and an intention to appropriate the region —

The President. And taking possession?

Mr. Carter. And intention to take possession. It was not necessary to take actual possession, at first. That would not be possible in many cases; but if the intention existed to take actual possession, and that intention were carried out within a reasonable

period, and not abandoned, the full and complete foundation of a right was laid.

How far did such a right extend? A nation discovers some part of the Atlantic Coast of the United States. Can it claim the whole Atlantic Coast upon the basis of that mere discovery? How great a strip of the coast does a discovery of one particular part of it entitle the nation which has made the discovery to claim? Could she say: "I will coast with vessels along this shore for a thousand miles or two thousand miles, and claim the whole of it on the strength of that?" That was one of the questions. Then again: How far inland does the right thus founded upon prior discovery extend? That was another question. Could a nation that had seen and observed a particular point on the coast of a continent extend its title indefinitely to the interior and perhaps to the ocean on the other side of it?

Those questions were never fully settled; but there was an approach to a settlement, and I think it was generally recognized that so much of a coast could be claimed by a discovering nation as it was in the power of that nation to fairly occupy.

So much for the coast. Then as to the interior. A discovering nation was entitled to carry back her claim into the interior as far as the rivers which emptied upon the coast to which she was entitled could be followed. That was a sort of general rule, having some recommendations in point of reason, which was asserted and to a certain extent recognised by the nations at the time.

Of course, the right of a nation in respect to the extent of territory which it could claim title to could not be limited to the mere point which it had discovered. Great Britain asserted that she had discovered the whole Atlantic Coast of the North, American continent, from Nova Scotia at the north, down to Florida at the south. I leave out of view now the controversy between Great Britain and Holland which affected that portion of the coast in which New York is situated; the title of Great Britain being finally vindicated to that. But she claimed, you may say, the whole Atlantic Coast in virtue of the right of prior discovery. Had she many establishments upon that coast at an early period? No; not half a dozen of them. That whole space, an extent of 3,000 miles or more, was asserted by Great Britain to be hers in virtue of no other title than a right of first discovery, and an occupation in half a dozen different places along the coast.

Russia, in making her discoveries of both shores of the Bering Sea, of the islands of the Bering Sea, and of the Northwest Coast down to the 54th or 50th degree of north latitude, claimed and asserted a sovereign right and dominion to the whole of the territories thus discovered, founded upon prior discovery. She follow-

ed up that assertion by the establishment of these trading posts, one or more of them, on the Alaskan shore of Bering Sea, several of them on the Northwest Coast, south of the peninsula of Alaska, and more or less of them — I do not know how many — upon the Siberian coast. Her title, therefore, was based upon an undisputed prior discovery, and upon an undisputed occupation, so far as those few establishments could give an occupation of the whole region. Did they give a fair occupation of that whole region? That is a question which it is proper to consider here. Was this a reasonable assertion by her of dominion over that vast region? Could she fairly claim to exclude other nations of the globe from a participation in the benefits of that discovery on the ground of her prior discovery, and the limited occupation which she had thus made? Was that a fair and reasonable claim? Possession of everything must, of course, correspond to the nature of the thing. If a nation had discovered some very fruitful part of the globe, — the West Indies, for instance, the more southern parts of the United States, — and had attempted to lay a claim to a thousand miles of the coast, upon the mere basis of an occupation at one point, it might be deemed very unreasonable. Other nations might come in, and say: "You are not fairly improving the discovery you have made. Here is a coast capable of cultivation, capable of extensive settlements, capable of supporting a numerous population, capable of enormous production. You are not putting it to the uses and purposes for which nature intended it; you are leaving it in a wild and desolate condition; you are improving only a small portion of it; and yet you assume to shut out the rest of mankind from the benefits of it on the basis of that very small and limited occupation. That is not just or right, and you shall not be permitted to do it."

Assertions of that character were made at this time, and the justice of them was quite apparent. How was it with this northern region? It had, as I have already said, but one product, and that was these fur-bearing animals. That one product was extremely limited, exhaustible in its character, and could be fully reaped and gathered by one nation. All that it was necessary to do to gather the product of this enormous region was to establish a few trading posts, which should be the centres of commercial establishments, and out from which vessels could go along the coast, from time to time, to gather from the natives the stores of skins they had collected. In that way the entire product of this whole region could be reaped easily by one power, and there was not enough for more than one.

The President. If you please, we will rise here, and resume the hearing at 2 o'clock.

[The Tribunal thereupon took a recess for an hour.]

Mr. Carter. I was speaking, Mr President, at the time the Tribunal rose in reference to the point of the nature of the occupation which it was necessary that a nation should take in order to make good the title founded upon first discovery of a new region. And I had said that the nature of that occupation must depend upon the nature of the thing to be occupied, and that while acts of occupation in one quarter of the globe might be sufficient to make good a title to but a very limited portion, in other portions of the globe they might be sufficient to make a title to a very considerable region of the earth. Now I wish to apply those views to this Bering Sea region, which was the great theatre of Russian enterprise, and to show, upon all the principles recognized in that age, that her exclusive title to all, or nearly all, of this region is very fully made out. And, in the first place, let me again bring to your attention here that the sole product of this region was substantially fur-bearing animals and other animals useful for their skins, and that the gathering of that product was the sole benefit that mankind could derive from that portion of the globe at the time. And, next, there was only enough for one power, and that one power was abundantly competent to reap the entire harvest. There was not enough for two. Several nations might, indeed, contend for the benefits of this trade in fur-bearing animals, but if they did, there would not be enough for all of them, whilst the Russian trade would be impoverished; and that would be of no advantage to the other nations of the earth: they would make investments in it which would not be remunerated. It would be best, therefore, for the countries immediately concerned that the reaping of the entire harvest should be left to one. But, in the next place, it would be better for the interests of mankind; and that is the important consideration here. By leaving the monopoly of the fur trade and of the other animals to Russia alone the trade would be regular; the world would be regularly furnished by the product of this region; it would be furnished at the smallest expenditure in money and labor, and it would be furnished, therefore, at the lowest price. And, consequently, all interests — those of rival nations and of the whole world itself — would be best served by confining the trade to the one Power. The bounty was easily exhaustible, and wherever a product of Nature is exhaustible, it is better to leave the whole to be exploited by one. Now, acting upon these views, Russia made a perfectly good title according to the ideas of that age and according to a principle entirely defensible: she established trading stations on the coast of Siberia, on the coast of Alaska and on Bering Sea, and still others along this north-west coast. It is true that along the north-west coast she met with the rivalry of

other nations, and they made similar establishments along that coast, although not to such an extent as Russia did. But all north of the 60th degree of latitude was left exclusively to her.

The President. Did you say 60th or 62nd?

Mr. Carter. I say the 60th. It is sometimes called the 61st. The line which separated the unquestioned part of Russian possessions from those which were questioned was sometimes styled the 60th or 61st degree of north latitude. Now that was a title which Russia had asserted upon the ground of prior discovery, earlier than the year 1800; that occupation she had made earlier than 1800. She had, in her own view—and I think justly—done every act necessary to secure to her a complete and exclusive title upon all the shores and all the islands of that sea, and to the Aleutian Islands, which bounded it on the southern side. In 1799, acting upon the assumption that she had thus acquired an exclusive title, she made a grant of the exclusive privilege of that trade to a corporation existing under her laws, and that was by what is called the Ukase of 1799, or, perhaps more correctly, the charter of the American Company. It is found on page 14 of the first volume of the Appendix to the American Case.

[**Mr. Carter** here read the first four sections of the Ukase.]

These extracts from that Ukase will be sufficient to convey an idea of the nature and extent of this grant by the Russian Government. It was not a public tact notified to all the other nations of the world; and the criticism is on this ground made by the learned Counsel for Great Britain in their Case that it was a concession only in favor of certain Russian subjects, and was not leveled against other nations, and therefore no evidence of an exclusive right against other nations. But that seems not to be a correct view. It was on the face of it an assumption of property and complete dominion by Russia over the whole region. The act would have had no significance unless Russia had entertained the view that she was the sole proprietor, against all other nations, of that region and of those products. And, except upon that view, it would have operated, not in favor of Russian citizens, as it was designed to operate, but against them. If it were allowed that it was in favor of certain Russian subjects and not in favor of others, its effect would have been to extend the privilege to all nations and relieve them very largely of Russian competition. Of course, such could not have been its intention. The design was, not to prompt other nations to interfere with that trade, but to secure the whole of it for the benefit of Russia alone. That, I think, is very clearly the proper interpretation of that Act. And it is to be observed, in the next place, that part of its design proceeded upon the notion that the products of this region were few, limited, and

exhaustible, and that therefore it was not wise that there should continue to be, even among Russian subjects, a disastrous competition for the purpose of reaping the benefits of that region. A trade of this nature, if engaged in by many Russian subjects, would be a source of loss, and it was better to confine it to one proprietor. These were the motives upon which the Charter of 1799 was based. In order to show the view entertained by Russia at this time, I may read a quotation which appears on page 15 of our Counter-Case, from a letter from the Russian-American Company to the Russian Minister of Finance (quoting) :

The exclusive right granted to the Company in the year 1799 imposed the prohibition to trade in those regions, not only upon foreigners but also upon Russian subjects not belonging to the company. This prohibition was again affirmed and more clearly defined in the new privileges granted in the year 1821, and in the regulations concerning the limits of navigation.

Now the next public act of Russia in relation to this region was the celebrated Ukase of 1821, which cuts such a figure in this controversy. This Ukase was of a different character in one particular : it purported to be levelled against other nations and to prohibit their interference with this trade. It will be found on page 16 of the first volume of the Appendix to the American Case. The substance of it consists of rules relating to the navigation and trade of these northern regions and the first three sections of those rules are the ones which more nearly concern us. They are as follows :

SEC. 1. — The pursuits of commerce, whaling, and fishery, and of all other industry on all islands, ports, and gulfs, including the whole of the northwest coast of America, beginning from Behring's Straits to the 51° of northern latitude, also from the Aleutian Islands to the eastern coast of Siberia, as well as along the Kurile Islands from Behring's Straits to the South Cape of the Island of Urup, viz., to the 45° 50' northern latitude, is exclusively granted to Russian subjects.

SEC. 2. — It is therefore prohibited to all foreign vessels not only to land on the coasts and islands belonging to Russia as stated above, but also to approach them within less than a hundred Italian miles. The transgressor's vessel is subject to confiscation along with the whole cargo.

SEC. 3. — An exception to this rule is to be made in favor of vessels carried thither by heavy gales or real want of provisions, and unable to make any other shore but such as belongs to Russia. In these cases they are obliged to produce convincing proofs of actual reason for such an exception. Ships of friendly governments merely on discoveries are likewise exempt from the foregoing rule (Sec. 2).

In this case, however, they must previously be provided with passports from the Russian Minister of the Navy.

Then follows an elaborate series of rules designed to operate upon foreign vessels, and to apply to cases where there are any infractions of these prohibitions, and, where seizures and confisca-

tions shall follow, providing how the confiscations shall be made.
[Quoting again at the request of Sir Charles Russell] :

SEC. 14. — It is likewise interdicted to foreign ships to carry on any traffic or barter with the natives of the islands, and of the northwest coast of America, in the whole extent hereabove mentioned. A ship convicted of this trade shall be confiscated.

Now here was an assertion of sovereignty over the whole shore on the Asiatic Coast, from Bering Straits down to the Island of Urup, which is about where the pointer now is [indicating the position on the map], and near the 47th degree of north latitude, and it extended on the American Coast of Bering Straits down to the 51st degree of north latitude, thus carrying the Russians further south on the American Coast than they were carried by the Charter of 1799, which limited them to 55°. The character, therefore, of that public Act of Russia, so far as the shores were concerned, was unmistakable. It assumed absolute and entire sovereignty over them, and, as I have already pointed out, it was perfectly well supported by her title, which had been acquired and established over those regions, a title just in itself and entirely acceded to in that age of discovery. What was the character of that assertion in respect to the *sea*, for that is the important question before us? Was it an assumption of dominion on the part of Russia over the whole of Bering Sea, and to that part of the Pacific Ocean embraced within those boundaries? Did it assume, did it purport, to be an assumption of dominion on the part of Russia over the whole of Bering Sea and of the north of the Pacific Ocean along these lines? I do not think that there is any evidence whatever that that was the nature or intention of the Ukase—none at all. An assumption of that kind would have been tantamount to saying that that vast extent of sea was Russia's property and included within her territory, and therefore subject to her dominion and laws as such. But there is nothing in this Ukase of 1824 importing that the intention of Russia was to make any such pretension as that in the way of authority over the sea. She said this :

SEC. 1. — The pursuits of commerce, whaling, and fishery, and of all other industry on all islands, ports, and gulfs, including the whole of the northwest coast of America, beginning from Bering's Straits to the 51° of northern latitude, also from the Aleutian Islands to the eastern coast of Siberia, as well as along the Kurile Islands from Bering's Straits to the South Cape of the Island of Urup, viz, to the 45° 50' northern latitude, is exclusively granted to Russian subjects.

That was a grant of colonial trade, and of colonial trade alone; that is all. And that is what Russia, according to the doctrines of that age, had a perfect right to do. Nothing was more clearly admitted at that time, than that every nation had a right to arro-

gate to itself the exclusive benefits of trade with its colonies, and to prohibit every other nation from engaging in such trade, and to take such measures as might be necessary to enforce the exclusion of other nations. What did Russia next do? Was there anything of the nature of sovereign dominion? Nothing of the kind.

SEC. 2. — It is therefore prohibited to all foreign vessels not only to land on the coasts and islands belonging to Russia as stated above, but also to approach them within less than a hundred Italian miles. The transgressor's vessel is subject to confiscation along with the whole cargo.

Mr. Justice Harlan. That is not an absolute doctrine now.

Mr. Carter. It is an admitted doctrine now. Every nation has a right to claim for itself the benefits of its colonial trade. Now all that Russia undertook to do was to adopt a measure designed to protect an exclusive grant of its colonial trade, and it adopted the measure — a familiar one in that age, — to interdict the approach of a foreign vessel within a certain line of the coast. Now what was the reason of that? The general rule of international law which limited the sovereignty of a nation to a strip of the sea three miles in width and along its coast, was not as well known and acknowledged in that age as it is now, but it was nearly so. It was perfectly familiar at that time to the statesmen, jurists, and legislators of the world; not perhaps so perfectly established as now — for the freedom of the seas was subject to more limitations then than now — but still it was a recognized doctrine at that time. But of course the territorial limit of a nation could not be the limit beyond which it could not exercise any power at all for the purpose of protecting an interest attached to the shore; it would be permissible for a nation to preserve the right to its colonial trade by interdicting the approach of foreign vessels within a much greater width than three miles. If a foreign vessel could come to within a short distance though more than three miles at a favorable moment for its purposes, the all benefits of the colonial trade of a nation could not be secured to that nation. A nation must be permitted to prevent vessels from hovering on the coast.

The President. Do you mean in reference to offences involving confiscation?

Mr. Carter. What I mean to say is that the offences which involve confiscation could be committed by coming within one hundred miles.

The President. But could that be if committed outside the three mile limit?

Mr. Carter. I say not only beyond the three mile limit, but

even beyond the hundred mile limit. The treaty is silent upon that point, but that is one of the sections of the prohibition. Now, in order to show what measures were usually resorted to for the purpose of protecting colonial trade, and what measures were sanctioned, I may refer the learned Arbitrators to a decision of Chief Justice Marshall of the Supreme Court of the United States in the case of *Church against Hubbard*, which is reported in the second of Cranch's Reports, page 187. Mr. Chief Justice Marshall in that case says :

That the law of nations prohibits the exercise of any act of authority over a vessel in the situation of the *Aurora*, and that this seizure is, on that account, a mere maritime trespass not within the exception, cannot be admitted. To reason from the extent of the protection a nation will afford to foreigners, to the extent of the means it may use for its own security, does not seem to be perfectly correct. It is opposed by principles which are universally acknowledged. The authority of a nation within its own territory is absolute and exclusive. The seizure of a vessel within the range of its cannon by a foreign force is an invasion of that territory, and is a hostile act which it is its duty to repel. But its power to secure itself from injury may certainly be exercised beyond the limits of its territory.

Upon this principle, the right of a belligerent to search a neutral vessel on the high seas for contraband of war is universally admitted, because the belligerent has a right to prevent the injury done to himself by the assistance intended for his enemy. So too, a nation has a right to prohibit any commerce with its colonies. Any attempt to violate the laws made to protect this right is an injury to itself which it may prevent, and it has a right to use the means necessary for its prevention. These means do not appear to be limited within any certain marked boundaries, which remain the same at all times and in all situations. If they are such as unnecessarily to vex and harass foreign lawful commerce, foreign nations will resist their exercise. If they are such as are reasonable and necessary to secure their laws from violation, they will be submitted to.

In different seas and on different coasts a wider or more contracted range in which to exercise the vigilance of the Government will be assented to. Thus in the Channel, where a very great part of the commerce to and from all the north of Europe passes through a very narrow sea, the seizure of vessels on suspicion of attempting an illicit trade must necessarily be restricted to very narrow limits; but on the coast of South America, seldom frequented by vessels but for the purpose of illicit trade, the vigilance of the Government may be extended somewhat further, and foreign nations submit to such regulations as are reasonable in themselves and are really necessary to secure that monopoly of colonial commerce, which is claimed by all nations holding distant possessions.

If this right be extended too far, the exercise of it will be resisted. It has occasioned long and frequent contests which have sometimes ended in open war. The English, it will be well recollected, complained of the right claimed by Spain to search their vessels on the high seas, which was carried so far that the *Guarda Costas* of that nation seized vessels not in the neighborhood of their coasts. This practice was the subject of long and fruitless negotiations, and at length of open war. The right of the Spaniards was supposed to be exercised unreasonably and vexatiously, but it never was

contended that it could only be exercised within the range of the cannon from their batteries.

Indeed, the right given to our own revenue cutters to visit vessels four leagues from our coasts is a declaration that in the opinion of the American Government no such principle as that contended for has a real existence. Nothing, then, is to be drawn from the laws of the usages of nations, which gives to this part of the contract before the court the very limited construction which the plaintiff insists on, or which proves that the seizure of the *Aurora* by the Portuguese governor was an act of lawless violence.

The *Aurora* was on the high seas at that time. This was a case upon a policy of marine insurance, and the policy contained a warranty that the vessel should not engage in prohibited trade. The vessel had been taken by a Portuguese force as having been engaged in a trade prohibited by the law of Portugal, and she was captured far outside the three-mile limit and for an offence committed outside the three mile limit.

The President. In time of peace?

Mr. Carter. In time of peace. According to the law of Spain, this vessel had, it was alleged, come within this limit — I do not remember the limit — but it was much more than three miles. The vessel had, as was alleged, committed an offence against that law of Spain designed to protect her trade; and having committed that offence, the Spanish cruiser, or some other Spanish force seized her, and the insurance companies set that up as a defence against their liability. The argument was, on the part of the plaintiff in the suit, that she was not engaged in prohibited trade, and that if she were, she could not be captured by a Spanish cruiser in the manner in which she had been; and that no nation had any authority to say that a vessel should not come within a certain distance greater than the three miles. Mr. Chief Justice Marshall was of a different opinion, as appears from the passage I have just read.

Mr. Justice Harlan. What is the date of that decision?

Mr. Carter. 1804 or 1805, perhaps, I do not remember.

Mr. Phelps. This opinion is printed on page 181 of our Argument.

The President (to Mr. Carter). Is it your contention that this principle prevails at the present day in international law?

Mr. Carter. It is our contention, but we suppose that there could be no dispute on that point.

Sir Charles Russell. It may be open to observation.

Mr. Carter. When the other side come to make their observation on that point they will have to upset the opinion of Lord Chief Justice Coburn in *Regina v. Kehn*, not long ago. That case engaged the attention of a large number of judges in Great Britain. Chief Justice Marshall's decision was quoted by Lord

Chief-Justice Coburn with entire approbation. Now then, what was the character of this assertion of authority by Russia? Was it an assertion of general dominion over the seas, of an extension of her territory over all the Bering Sea and part of the Pacific Ocean — of a right to legislate against foreign nations in respect to these seas — of a right to exclude other nations from them — was that the nature of the pretension set up? Not at all. There was a grant to a private company of the exclusive privilege of colonial trade to which Russia had a perfect title; and it was designed to prohibit any interference with that trade by other nations. It is apparent on the face of it. It says: "We *therefore* interdict, because we have made this grant, and for the purpose of protecting that grant." Now, that interdiction may have been reasonable or unreasonable; but the doctrine upon which it was founded is justified, not only by the practice of nations, but by every rule of international law, and it stands as good to-day as in that time. I have said it may have been reasonable or unreasonable. I may say that it was in the highest degree reasonable. You will remember the decision of Chief Justice Marshall, just read, that such an exclusion of the vessels of a nation on a frequented coast, the general pathway of commerce, would be unreasonable, and would not be submitted to by other nations. It would interfere with their commerce too much. But in a distant and remote sea, a larger exclusion might be justifiable. For, what purpose could a vessel other than Russian entering Bering Sea in 1821 have? Whaling was at that time very little if at all practised. The probabilities are that if any vessel were found in those seas it was for the purpose of engaging in trade connected with the shores, and therefore the probability was that she was engaged in an illicit trade. The very circumstance that she was in that Russian Sea was a suspicious circumstance, and justified her being treated as being engaged in suspicious business.

The President. You mean if the ship had been engaged in whaling?

Mr. Carter. It would have applied undoubtedly to a vessel if her object had been whaling. It was not the intention of Russia to assume general dominion over those seas. A vessel might be whaling and be within one hundred miles of the shore without exposing herself to any suspicion of unjustifiable trade; but whaling was substantially unknown at that time.

The President. Whaling is the first item mentioned.

Mr. Carter. Yes.

The President. You establish a difference between whaling and fishing?

Mr. Carter. I think the fair interpretation of that grant does not include whaling.

The President. But fishing in the open sea would not be interdicted?

Mr. Carter. I think the interdict is confined to what is done on the coasts (quoting again):

Sec. 1. — The pursuits of commerce, whaling, and fishery, and of all other industry on all islands, ports, and gulfs including the whole of the northwest coast of America, beginning from Behring's Straits to the 51° of northern latitude, also from the Aleutian Islands to the eastern coast of Siberia, as well as along the Kurile Islands from Behring's Straits to the South Cape of the Island of Urup, viz, to the 45°50' northern latitude, is exclusively granted to Russian subjects.

That is a grant to the exclusive pursuit of commerce, whaling, fishery, and all other industries *on all islands, ports, and gulfs*.

The President. The hundred-mile limit is for the hovering?

Mr. Carter. The hundred-mile limit is for the purpose of preventing infractions.

The President. But they must come to the coasts?

Mr. Carter. The mere coming within one hundred miles would be an infraction. But you must separate the grant from the measure of protection which was contrived for the purpose of securing the grant. The grant is one thing, the measure is another. Her mere presence there is a violation. Now, I have said that upon the face of this Ukase it does not purport to assume dominion over any part of the sea; it purports only to establish a defensive and self-protecting regulation which is to operate over one hundred miles of the sea. And let me say right here, as it appears to be interesting the Arbitrators, that such things were extremely common and are found at the present day. For instance, every nation has its custom laws, and of course there are universally carried on operations to evade those laws; and one manner of doing this is for a vessel having a cargo of goods on board to come and hover on the coast of a nation until another vessel comes out and transships her cargo. Now, a nation must have the privilege of preventing this in some way; and if a nation were not permitted to exclude the smuggler for more than three miles from the coast, she would be almost defenceless against it. And therefore nations must have some manner of preventing vessels from coming within sight of the shore.

Justice Harlan. Is your argument to the first and third points of the Articles of the Treaty?

Mr. Carter. My point is confined to an explanation of the

real nature of this prohibition contained in the Russian Ukase of 1821.

Justice Harlan. I am speaking of the first point of Article VI of the Treaty; it does not require attention from the Arbitrators, because it relates to Russia.

Mr. Carter. Well, it is a part of my argument not only to show that Russia did assert the exercise of a self-defensive power, but also the rightfulness of the assertion. It is not important to urge it, but it is a fair part of the discussion. It may be well contended that not only did Russia make this assertion, but that it was a rightful one. For the purpose of showing that, let me speak of the hovering acts. The laws and statutes of Great Britain —

Mr. Phelps. And France.

Mr. Carter. And France as well, for the prevention of smuggling, forbid a vessel from hovering on the coast.

They prohibited any vessel, foreign or other, from hovering there; and the penalty for hovering within four miles is capture and confiscation.

Sir Charles Russel. Four leagues.

Mr. Carter. Four leagues — the penalty is capture and confiscation. It is the universal penalty. So, also, there are quarantine laws, which under certain circumstances require vessels at certain times to come to at a distance from the shore much further out than three miles, and await a boarding vessel there; and the penalty for a violation of such enactments is always capture and confiscation.

So that this instance of an exercise of authority by Russia operative over a belt of the sea beyond the limits of three miles is not an exceptional exercise of authority, but one commonly resorted to, and always resorted to when there was the necessity for a defensive and protective measure of that character.

I will not go any further into that discussion at this time. What I have thus far said goes to show that that is the nature of this regulation on the face of it.

I have now to point out to the learned Arbitrators that that was the view taken of it by Russia at the time; for when it was protested against by Mr. John Quincy Adams, then Secretary of State of the United States, this was the explanation, or part of the explanation, given by the Russian Government. I read from the note of Monsieur de Poletica to Mr. Adams, on page 133, Volume first of the American Appendix :

I shall be more succinct, sir, in the exposition of the motives which determined the Imperial Government to prohibit foreign vessels from approaching the northwest coast of America belonging to Russia within the distance of at

least 100 Italian miles. This measure, however severe it may at first appear, is, after all, but a measure of prevention. It is exclusively directed against the culpable enterprises of foreign adventurers, who, not content with exercising upon the coasts above mentioned an illicit trade very prejudicial to the rights reserved entirely to the Russian American Company, take upon them besides to furnish arms and ammunition to the natives in the Russian possessions in America, exciting them likewise in every manner to resist and revolt against the authorities there established.

The American Government doubtless recollects that the irregular conduct of these adventurers, the majority of whom was composed of American citizens, has been the object of the most pressing remonstrances on the part of Russia to the Federal Government from the time that diplomatic missions were organized between the countries. These remonstrances, repeated at different times, remain constantly without effect, and the inconveniences to which they ought to bring a remedy continue to increase..... Pacific means not having brought any alleviation to the just grievances of the Russian American Company against foreign navigators in the waters which environ their establishments on the northwest coasts of America, the Imperial Government saw itself under the necessity of having recourse to the means of coercion, and of measuring the rigor according to the inveterate character of the evil to which it wished to put a stop.....

I ought, in the last place, to request you to consider, sir, that the Russian possessions in the Pacific Ocean extend, on the northwest coast of America, from Behring's Strait to the fifty-first degree of north latitude, and on the opposite side of Asia and the islands adjacent, from the same strait to the forty-fifth degree. The extent of sea of which these possessions form the limits comprehends all the conditions which are ordinarily attached to *shut seas* (*mers fermées*), and the Russian Government might consequently judge itself authorized to exercise upon this sea the right of sovereignty, and especially that of entirely interdicting the entrance of foreigners. But it preferred only asserting its essential rights, without taking any advantage of localities.

We have not only the fair interpretation of the Ukase itself, but the express declaration of the Russian Government, that this prohibition of the entry of foreign vessels within 100 miles along the shores of this whole coast was not designed as an assertion of sovereign dominion at all, but only to defend the colonial trade of Russia against illicit invasions of it by foreigners.

Mr. Middleton, the American Minister at St. Petersburg at that time, addresses a note to Mr. Adams in which he says that this is the purpose which the Russian Government had in view in making the declaration of this Ukase. I read an extract from a letter of Mr. Middleton to Mr. Adams, found on page 135 of the first volume of our Appendix :

To Mr. Speransky, Governor General of Siberia, who had been one of the committee originating this measure, I stated my objections at length. He informed me that the first intention had been (as Mr. Poletica afterwards wrote you) to declare the northern portion of the Pacific Ocean *mare clausum*, but that idea being abandoned, probably on account of its extravagance, they determined to adopt the more moderate measure of establishing limits to the

maritime jurisdiction on their coasts, such as should secure to the Russian American Fur Company the monopoly of the very lucrative traffic they carry on. In order to do this they sought a precedent and found the distance of 30 leagues, named in treaty of Utrecht, and which may be calculated at about 100 Italian miles, sufficient for all purposes.

The President. Is there any evidence that you know of that the Russians at any time previously to that correspondence, had asserted the right of *mare clausum*, the right of sovereignty to the Bering Sea?

Mr. Carter. None whatever, neither before nor since, in my view, unless this Ukase constitutes an assertion of authority; which I do not think it does.

The President. It was a position which they might have assumed, but it seems they state that they do not assert it.

Mr. Carter. Yes, they suggested that they had the right to assert it. But they protest that they have not asserted it in fact.

Having described this Ukase of 1821, and the nature of it such as it appears to be from a fair interpretation of the face of it, and from the declarations made by the Russian Government in reference to it, I next proceed to call the attention of the Arbitrators to the notice which was taken of it by the American and the British Governments. The particular subject of the protests I shall postpone for a few moments for the purpose of dealing more particularly with the question of the rights of Russia in or over Bering Sea and its shores, what they were, and the place which they fill in argument here, and in the questions submitted to the Tribunal.

We see what the claim of Russia was by this Ukase of 1821; that it was an assertion, not of the right of sovereignty, but of the right to establish a protective regulation, operative indeed at a greater distance than three miles from the shore. I have, in the course of pointing that out, somewhat briefly alluded to the distinction between the exercise of full and sovereign dominion of a nation over the sea, or over land, as far as that goes, and the exercise of a self-protecting power, such as a defensive regulation of this sort is. I wish to follow up those observations a little further, for the purpose of fixing in the minds of the Arbitrators the real nature of these two different things and of their essential differences.

What is full dominion or sovereignty such as is exercised by a nation? What is it? A full right of sovereignty includes, of course, a full right of property over all the territory to which that sovereignty extends. When I say a full right of property, I mean of absolute property in the territory over which it extends. That is included in the idea of sovereignty; and it includes in the next place —

The President. You do not mean property in the civil sense?

Mr. Carter. I do mean property in the civil sense; but I ought perhaps to explain that. Take the private property in the land of any particular country. Writers on the law of property separate property interests into two parts. One of them they call the *dominium utile*, and the other the *dominium eminens*. The *dominium utile*, is the right to use and enjoy; and it is that, and that only, which is vested in private individuals. The *dominium eminens* means the absolute property, by an exercise of which a nation can at any time displace the individual right. That *dominium eminens* is vested in the sovereign power alone, in the Government; and it is that sovereign right of property which I mean when I say that sovereignty embraces the full property right in the territory over which it extends.

In the next place, it embraces the right of legislation over the whole territory, the right of legislation in respect to persons and things, and consequently the power of excluding any foreign nation or its citizens from any part of the domain which it covers. It embraces the full right of Government; and that is necessarily exclusive of every other Government. No other Government can make a single regulation which has any binding force upon the territory of a foreign power.

This right of sovereignty, embracing both property and the right of legislation, is necessarily limited by a rigid boundary line. That is one characteristic of sovereignty; it must be limited by a rigid boundary line. Property cannot exist unless it is specified and described; and, of course, the limits of the laws of a Government must be absolutely and precisely known; they cannot shift and vary according to circumstances. It is, therefore, the characteristic of this full sovereignty which a nation possesses over its territory that it is limited rigidly by a boundary line, and that right of sovereignty is possessed by the nation as a Government, as an organized community engaged in the business of administering the laws and welfare of the territory over which it extends.

There is another class of rights which a nation may enjoy and does enjoy, not thus rigidly limited by a boundary line, but which it may exercise wherever it goes in its capacity as an individual. First let me mention the great right of self-defence that accompanies a nation wherever it goes and may be exercised by a nation, not because it is a Government, but because it is an individual. It exercises this right of self-defence much as an individual exercises it. All of us have the same right of self-defence, not because we have any Governmental power, but because we are persons who

have rights, and that is one of them. Just so it is with nations; wherever they have a right to be, there they can exercise those powers which are necessary to protect them as persons.

In addition to protecting themselves as persons they may protect their property. Nations being corporate persons, not natural persons, can scarcely be touched outside the limits of their territory except in the way of touching their property. I say those rights of self-protection may be exercised by a nation wherever the nation has a right to be; and a nation has a right to be anywhere upon the high seas. A nation goes wherever its property goes, from one end of the world to the other, and it exists as a nation until it reaches the boundaries of some other nation. It cannot pass those. But on the high seas all the nations of the world exist together. They are citizens together upon those seas. Their commerce goes upon those seas, and wherever their citizens and their commerce go, there the nation goes, there its power goes, as an individual. There, if its property is attacked or its citizens are attacked, it has a right to defend them. It has the great right of self-defence, and it has a right to use just such means and methods and weapons as are necessary fully and perfectly to protect itself. That is not because it is a government, but because it is an individual. It has a right to be on the great highway of nations, to go there with its interests, and if it could not protect its interests, how could they be protected at all? Take the case of a fleet of American merchantmen which might be convoyed by an American man-of-war. Suppose it should be attacked somewhere on the high seas. Can it not be defended? What is the man-of-war convoying them for, except for the purposes of defence? Wherever upon the seas a nation's property is, if that property is in any manner assailed, it must protect it. Commerce could not exist; the intercourse of nations could not subsist, except upon these principles. Let it be supposed that the citizens of some foreign nation should commit a trespass upon the property of citizens of the United States somewhere upon the high seas, and the owners of that property should make complaint to their own Government, and that Government should go to the nation to which the trespassers belonged, and complain and say: "The citizens of your nation have been injuring the property of our citizens on the high seas; we ask you to make redress". The answer would be: "Can you not protect your own citizens. Have you not just as much power to protect your citizens on the high seas as we have? If a trespass was attempted against them, why did they not resist and beat off the trespassers, and if they were not able to do that they may resort to the courts of any nation in the world to obtain their redress".

But these principles do not rest upon any theoretic statement. They have been universally admitted in the practice of nations; and it is absolutely true — there is no sort of qualification to the proposition — that wherever a nation has found it necessary to exert acts of force upon the high seas in order to protect its own rights or the rights of its citizens, it has the right to exert such acts of force. There are many illustrations of it. Many of them arise — because that is where the occasion most frequently arises — under belligerent conditions. Suppose there is a war between the United States and Great Britain, and a port of the United States is blockaded and a British vessel finds a vessel belonging to France attempting to enter that blockaded port. What does she do? She captures her and carries her in for condemnation. Why? Here is a French vessel, friendly to both powers, not designing to injure either one of them, engaged in peaceful commerce, not directly aiding or assisting the belligerents; and yet when she attempts to enter the port of one of them with whom she is a friend, the other who is also a friend, takes her and captures her. How is that to be defended? It is defended on the ground of necessity. Great Britain says: "I am carrying on a war with the United States; I am endeavoring to subdue the United States, and to compel her to come to peace with me. I have a right to reduce her to extremity; and here you are carrying in provisions, or what not, and thus helping to prolong the war and prevent me from subduing my enemy. — which I have right to do — and, therefore, I take you and capture you on the high seas." The case of contraband goods is the same. A vessel is found on the high seas, not attempting to enter any blockaded port, but bound to one of the belligerent ports and having on board contraband of war. What is done? She is taken and captured because it is necessary. She is attempting to assist an enemy. That is, she is doing acts which would amount to an assistance and which render the operations of one of the belligerent parties less effective.

It is admitted in international law that when two nations are at war their rights in certain particulars are supreme over other nations, and they have a right to do these acts upon the high seas because they are necessary for self-defence and self protection. I speak here of belligerent conditions; let me pass to other conditions — peaceful conditions — some of those to which I have already alluded, a defence of colonial trade.

The territory of a nation does not extend more than three miles beyond its coast. We know that. A nation cannot extend its system of law beyond that three miles. We know that; but nevertheless it has a right, as a person, to exert any power of self-defence against threatened invasion of its interests by other

persons, and it has a right to do all acts which are necessary for that purpose. The line up to which it may exercise its authority is not a boundary line upon the earth's surface, but it is a line limited by necessity, and by necessity alone. The right is created by necessity, and of course has no other limit than the necessity which creates it.

The same is the case with all those municipal laws of various nations designed to prevent smuggling. They are enforced the world over, have been enforced for centuries, and are to-day. They purport to be municipal regulations, municipal laws. They are municipal laws in every sense of the word. The hovering statutes of Great Britain, forbidding a vessel to hover within four leagues of her coast, are binding upon her own citizens because they are laws. Are they binding upon other nations because they are laws? No, they are binding upon other nations because they are defensive acts of force which she has a right to exert. She would be quite right to exert them even if the laws had not been passed. If Great Britain had no hovering law upon her statute book, she would have a right to give instructions to her cruisers to prevent vessels hovering upon her coast under circumstances calculated to excite suspicion that they were engaged in smuggling; and if other powers should complain of that, the only question would be whether it was reasonable or not. Great Britain, being a constitutional Government, of course cannot very well capture vessels upon the high seas, carry them in and libel them in her courts for condemnation, without a system of municipal law providing for it. Neither can the United States. In such countries, not under an absolute Government, it is necessary to have enactments of municipal law for the purpose of governing seizures in the case of condemnation. These methods are all prescribed by municipal laws. These municipal laws are perfectly valid and binding — valid and binding as laws upon the citizens of the nation enacting the, valid and binding upon citizens of other states, not as laws, but because they are reasonable for the exercise of a self-defensive power.

The circumstance that they are enacted into laws does not, of course, take away from them their validity. It only serves to render them more reasonable, because it subjects foreign citizens only to the same rule to which the citizens of the country themselves are subjected. Quarantine regulations are of the same character. A nation must have the right to protect itself against the entrance of contagious disease. No people in the world, on the ground that the seas are free, have a right to bring disease into dangerous proximity to the coasts of another nation; and if for the purpose of keeping infection clear of coasts, it were necessary

to keep vessels 100 miles off the coast, the right to do it would exist.

There is no such thing as universal rules in international law, or in respect to the freedom of the seas, as there are no universal rules in respect to anything. Everything in the world depends upon circumstances.

Whatever right, whatever acts of power, it is necessary for a nation to assert upon the high seas in order to protect its own essential interests, if they are fair, if they are moderate, if they are reasonable, if they are suited to the exigencies of the case, if they do not transcend the necessity which creates them, they are valid, and all other nations in the world are bound to respect them.

The President. If I understand you aright, your contention would be that the action of nations on the high seas is founded on the same principles in time of war as in time of peace?

Mr. Carter. Precisely. My position cannot be better stated than that. What gives these extraordinary rights to nations in times of war, is necessity — the necessity of self-defence. The same necessity can arise in times of peace just as well, and whenever it does arise, it demands the same remedies, and the same remedies are applied.

The President. Would you like to rest awhile, Mr. Carter?

Mr. Carter. No, I am not at all tired.

The President. The manner in which you express your views interests us very highly.

Mr. Carter. I thank you.

This right of self-defence, which I assert and which is so entirely different from the right of sovereign jurisdiction, does not militate at all against the freedom of the seas. It asserts the freedom of the seas. It is exceptional in its character. It asserts the general rule of the freedom of the seas, but says, notwithstanding that freedom, there are instances in which all nations are subjected to certain necessities, and those necessities beget and create the authority to use reasonable measures of defense and protection. All reasonable nations will accede to them and do accede to them, and, consequently, they have had their place in all time on the statute books of nations, and have never yet led to contention except in cases where they were really unreasonable, or supposed to be so.

Senator Morgan. Mr. Carter, I believe that you have not as yet read that part of the correspondence between the two Governments relating to the question of an assumption of damages in this treaty for trespasses alleged to have been committed against the Government of the United States.

Mr. Carter. No; I have not.

Senator Morgan. I wanted to ask you if, in the correspon-

dence that led up to this treaty, Great Britain did not refuse to admit her liability for any trespasses by her nationals upon the property of the United States?

Mr. Carter. Well, perhaps she did.

Sir Charles Russell. Certainly she did.

Senator Morgan. She did refuse?

Sir Charles Russell. Certainly.

Senator Morgan. And that was the reason why a claim for damages on the part of the United States was excluded from this treaty.

Mr. Carter. At a later stage in my argument I shall deal with that matter; but it does not seem to me to be especially relevant here.

Senator Morgan. It seems to my mind to be exactly in point, if you will allow me. Therefore, I ask the question; if Great Britain refuses such responsibility for trespasses by her nationals on the high seas must it not follow if the United States were the owners of this property, and if Great Britain has refused to become responsible for the trespass by her subjects or nationals, the United States may prevent the trespass and the consequent damage which they would otherwise suffer.

Mr. Carter. In my judgment the United States has the power to prevent the trespass and the consequent damage, whether Great Britain is willing to answer for the damages or not.

Senator Morgan. In this case I am trying to get at the history of it. That matter had been under discussion, and Great Britain had refused to become responsible for the trespasses of her nationals.

Sir Charles Russell. She denied that there was any trespass upon the property of the United States.

Senator Morgan. I understand that. My question is predicated upon the supposition that there was a trespass. It was the property of the United States, and if there was a trespass, has not Great Britain in this very negotiation refused to become responsible, and excluded it from this treaty on that account? That is the point I wanted to get at.

Mr. Carter. I believe that to have been the case.

Senator Morgan. I think that is pertinent.

Mr. Carter. In my view it is not among those things which in my mind are pertinent to the present discussion; and, of course, I cannot very well argue myself, except by employing those grounds and reasons which in my mind seem to be material.

Senator Morgan. I was only claiming the right to have the difficulty in my mind cleared up.

The President. Perhaps the counsel on either side will clear the matter up later on.

Senator Morgan. I trust I am not too early with the suggestion, because it is an important matter in the case, and I shall expect to hear argument upon it on both sides.

Mr. Carter. I will give to that question the attention which, from the interrogatory of the learned Arbitrator, it seems to deserve.

I have said that this position, which I am seeking to maintain, of the right to self-protection as distinguished from any assertion of sovereignty, is not in conflict with the ordinary doctrine of the freedom of the seas in any particular. It admits that doctrine, stands upon it, asserts it only as exceptional, justifiable in cases of necessity, and then justifiable only up to the extent of that necessity; but, in respect to the freedom of the seas, the position which we maintain does assert one thing, with positiveness. That is, that however free the seas may be in the just sense of the word, they are not free anywhere, in any quarter of the globe, at any distance from the shore — three miles or three hundred miles — for the commission of *wrong*, and whether a thing is wrong or not when committed on the high seas is just as easily determinable as it would be if the dominion of some municipal power extended over it. In other words, our position is that there is no part of the globe, on the sea or on the land, that is not under the dominion of law, and under the dominion of a law which the courts of every nation will take notice of, even the municipal tribunals, and under the dominion of a law which this Tribunal, as an international one, will particularly take notice of.

I have been thus explicit upon this subject, and have devoted to it the attention I have, for the reason that I think there has been considerable confusion about it. There is a confusion in relation to it in the opinions of writers upon international law. They have not, as a general rule, pointed out these two distinct and different species of authority which a nation may exercise. They have not clearly defined them. They have not placed upon them the limitations which clearly attach to them.

There is a confusion about them in the discussions of diplomats. There is a good deal of confusion on those two subjects in the diplomatic communications between Great Britain and America in respect to the subjects of this controversy. That confusion has found its way into the terms of the Treaty itself, and will be found in the phraseology of the questions which are submitted to this Tribunal. That confusion has arisen to a very considerable extent from the use of an ambiguous word — “jurisdiction” — to characterize and define both things. Both these species of authority are spoken of by jurists, by lawyers, in text books and elsewhere, under the general name of jurisdiction, and thus that word has become one of ambiguous import.

The word "jurisdiction" has sometimes been used, when we speak of the jurisdiction of a nation, in a certain narrow and rigid sense as describing the sovereign right of legislation; that is to say, as describing that authority the exercise of which is necessarily limited by a boundary line. It has been used sometimes in that narrow sense, and at other times it has been used to describe any act of authority which a nation might perform, whether within that line or outside of it. A similar ambiguity is found in the use of the word "jurisdiction" in relation to matters of municipal law. We sometimes speak of a court having jurisdiction in a particular controversy. That means that it has just authority to inquire into the merits of the controversy and to dispose of those merits by a definitive judgment. It means that generally; but we sometimes say, also, that a court has jurisdiction to *do* a certain thing, meaning by it that it has the power to do a certain thing. We sometimes speak of the jurisdiction of a municipal officer merely to describe the *power* of the officer. We say that a taxing officer has the jurisdiction to assess persons for taxation. We mean by it that he has the *power* to do it, and that is all we mean. "Jurisdiction" has no proper application to such an authority as that; and it is from this ambiguous use of this word that much of the doubt and difficulty respecting the subject have arisen.

What has been the claim of the United States in the course of this controversy in respect to the nature of the authority acquired by Russia in Bering Sea, and of the rights which Russia had gained in that sea, and the rights the United States has, consequently, gained by the acquisition of Alaska from her? Has the United States ever maintained at any time in the course of this controversy that Russia had acquired a dominion over Bering Sea, as if that sea were a part of her territory and that the United States had, in consequence, as the successor of Russia, acquired such right as that? Has the United States ever made any such claim as that? Never. At no time in the course of this controversy has it ever made any claim of that sort, or hinted a claim of that sort. It has always put its case upon other and very different grounds; namely, that Russia had property interests—interests in the nature of colonial trade and other industries—carried on on the shore of Bering Sea, which gave her a right to adopt protective measures which might be operative, indeed, over a reasonable extent of the sea as defensive measures; and that such a right as that the United States has also, not because it acquired it from Russia—because it would have it without any such acquisition; the only aid that it has asserted as having been derived from Russia was the fact that Russia had established these protective regulations in Bering Sea, and that other nations of the world, including Great Britain, had

acquiesced in them; and that Great Britain was not now in a condition to complain of them.

It has been, however, the effort — I say the effort; I suppose it has been the belief — of the learned counsel who have had the interests of Great Britain in charge, to impute to the United States the position of asserting that they had derived from Russia a dominion in Bering Sea — a sovereign dominion over that sea. That position has been imputed to the United States in the Case of Great Britain, and industriously imputed to it. I do not think there has ever been any good foundation for that.

In the Case of Great Britain, page 134, there is a quite formal statement of the several positions which, according to that Case, the United States have taken in reference to this controversy. I read from that :

The facts stated in this chapter show that the original ground upon which the vessels seized in 1886 and 1887 were condemned, was that Behring Sea was a *mare clausum*, an inland sea, and as such had been conveyed in part by Russia to the United States : that this ground was subsequently entirely abandoned, but a claim was then made to exclusive jurisdiction over one hundred miles from the coast line of the United States territory : that, subsequently, a further claim has been set up, to the effect that the United States have property in and a right of protection over, fur-seals in non-territorial waters.

That is the description in the Case of Great Britain of the positions which have been from time to time taken by the United States in reference to this controversy. It is a total error. As to the first part of it, there is to a certain extent, a foundation for the statement. The first part is “ that the original ground upon which the vessels seized in 1886 and 1887 were condemned was that Behring Sea was a *mare clausum*, an inland sea, and as such had been conveyed in part by Russia to the United States. ”

That does not say that the United States ever took that position. It only says that that was the ground upon which the vessels had been condemned. But I think the intent was to convey the notion that that was the attitude taken by the United States. The paragraph would be meaningless had it not that intent.

It is literally true that libels were filed, in the cases of the first seizures, against the British vessels in the United States District Court of Alaska, and that they were condemned ; and the judge in his charge to the jury, or in his opinion giving judgment, went into the case and stated that Russia by this Ukase had acquired a territorial dominion in Bering Sea. He stated that in his opinion — but has a judge in the United States District Court of Alaska an authority to speak in an international

controversy on behalf of the United States? Certainly none whatever. The position of the United States cannot be gathered from what a judge of a United States court happens to say in a charge to the jury. If it can, the United States would be responsible for the utterances of every twopenny justice of the peace throughout the land; which she would be very sorry to be.

Where is the position of the United States in reference to this controversy to be sought and found? In the utterances, the responsible utterances, of that Government made to Great Britain in diplomatic form. There is the place, and the only place, where they can properly be sought.

The President. Do you not think a Government is responsible to other nations for its judges?

Mr. Carter. To a certain extent, it is; and to a certain extent, it is not.

The President. You must take the nation as a whole.

Mr. Justice Harlan. Judges in the United States are independent of the Government.

The President. Not as a nation?

Mr. Justice Harlan. Yes; they are independent of the nation.

Mr. Carter. If a French citizen should have the misfortune to be involved in litigation in the United States, and a judgment should be pronounced against him which he did not like, and he should appeal to his own Government, and say he did not like it, and the Government should appeal to the United States, he would be told that he had no remedy; that the Government of the United States was not responsible for the conclusions to which the judges came. They might be law; they might not be law. He had had a fair trial; he had had the same opportunity which citizens of the United States have, and that is all the United States could give him; and I apprehend a similar answer would be made by the Government of France in a similar case.

The President. I am not quite sure as to that.

Mr. Carter. I do not know about France, but I am very sure that is the answer which would be given by Great Britain in a similar case.

The President. It is a rather difficult, and often-discussed point of international law, as to what is the responsibility of a nation.

Mr. Carter. Every Government is, of course, responsible in a certain sense to foreign nations, that the citizens of foreign nations, when they happen to fall within the reach of justice, shall obtain justice. That is, that they shall obtain the same sort of justice which is administered to the citizens of the country. That is the extent of the foreign obligation.

Sir Charles Russell. You have got a British ship on the ground of that judgment.

Mr. Carter. It is no more than a suit against a British citizen.

That is all it amounts to. Property of British citizens its attached. That is all the suit amounts to, and all that the United States is bound to do is to see that justice is done. The course of procedure in the United States must be followed. If the judgment of the United States District Court of Alaska was complained of, there was an opportunity to appeal to and obtain the judgment of the highest court in the land. No complaint could be made until that procedure had been followed and run out to its conclusion. It was not done. So no complaint could be made of that judgment, nor could the grounds upon which that judgment was rendered be in any manner imputed to the United States.

The President. I think we had better consider that as a particular question, which we will argue when it comes up later in the case.

Mr. Carter. Very well. Where are we to look for the true grounds upon which the United States based its position in these controversies? Why, obviously, to the diplomatic communications. The British Government did protest to the United States that this course was pursued, and that it was pursued by the authority of the United States in giving instructions to her cruisers; and they ask now "Tell us the authority upon which you proceed." That was the demand of the British Government — very properly made — "We want to know from you, not from a District judge up in Alaska, but from you, who have the authority to state, what your grounds are. It is from you that we wish to know the grounds upon which you presume to seize British vessels."

That demand was made; and what was the answer to it? for there is where you are to look to ascertain what the position is which the United States Government takes. Therefore, I must again call the attention of the arbitrators to the response which was first made to these demands.

The President. Do you mean to enter on a new subject?

Mr. Carter. I perceive that the hour of adjournment has about arrived; and the citations, I might perhaps as well leave I am going to read for the next session.

The President. We will meet on next Tuesday mornig, at half past 11 o'clock.

[The Tribunal accordingly adjourned.]

TENTH DAY, APRIL 18TH, 1893.

The Tribunal met pursuant to adjournment.

The President. Before Mr. Carter proceeds, I would beg to offer an observation. In the course of the last sitting we had, I might almost say, some conversation about a delicate matter, a matter, which is the subject of much controversy in international law — that of the responsibility of nations for their justice, or for the justice that is administered by them. I beg to remark that my intention was not at all to express any opinion. I merely wanted to know the extent and purport of the contention of the party concerned. I believe that whenever one of us addresses one of the learned counsel on either side it is always with the intention of ascertaining how far the intention and the contention of both parties, or of either party, go, and not at all to express a personal opinion, which of course on our bench we are not called upon to do; and since in this particular case if the words which have been pronounced were misconstrued, it is much less our intention to express any opinion which would be considered as binding upon the respective countries or governments to which either of us may happen to belong. It is in reference to the words which I spoke of in our last sitting that I think it necessary to make this remark.

Mr. Carter. I so understood the learned President.

The President. Mr. Carter, if you please to proceed, we will be glad to hear you.

Mr. Carter. Mr. President, my attention has been called to a copy of the *London Times* of Monday which contains some reference to my argument of Friday, and in certain respects misrepresented me to such an extent that I feel hardly at liberty to pass it without notice. I cannot, of course, think myself called upon to correct all misrepresentations of what I may say which may be found in the journals of the day; and I should not say a word in reference to this except that it represented me as making some very disparaging allusions to a distinguished and very worthy judge of a high court of the United States — I mean the District Judge of the United States for the district of Alaska. I made no observation whatever disparaging to him. I did indeed say that

the Government of the United States could not be held responsible for the grounds and reasons which judges assign in the decisions which they might give; that, if that were the case, the Government might be held responsible for the utterances as I said — and the observation might in good taste have been better withheld — of any two-penny justice of the peace. But, I of course, did not apply that observation to Judge Dawson, or intend in any manner to make any disparaging reference to him. I did not even say that his judgment was incorrect. On the contrary, his judgment, so far as related to the condemnation of the vessel, was a sound and correct judgment, which in the due course of my argument, I shall endeavor to defend; and I have no doubt it would have been affirmed to that extent by the Supreme Court of the United States. Nor did I, in saying that the Government of the United States was not responsible for the grounds stated by judges in their opinions as the basis of their decision, intend to intimate that the Government was not to a certain extent responsible to other nations for the correctness of the judgments themselves. The Government of the United States is, I suppose, responsible to other nations that the citizens of other nations shall have justice done them in the courts; but it is the correctness of the judgments for which they are responsible, not the soundness of the opinions which are given as the basis for them.

My argument on Friday was directed in the main to the question of the rights which had been acquired by Russia in the Bering Sea and transmitted by her to the United States by means of the cession of 1867. I had made a brief historical sketch of what may be called the Russian pretensions, closing that sketch with a statement of the Ukase of 1821 and of its real nature. I then came to consider the view which the United States take in relation to the Ukase of 1821 and the rights which might have been acquired under it; and I stated that, according to the views of the United States, that Ukase never asserted a right of sovereign dominion over any part of Bering Sea, but that its sole purpose, intention and effect were to assert a right to protect industries connected with the shore by protective regulations operative over a certain portion of the sea — a thing quite different from any assertion of sovereign dominion. I said that that was the view taken by the United States and which always had been taken by the United States; and it was in that connection that I observed that although a somewhat different view had been taken by the learned District Judge of Alaska the United States had never adopted that view in its diplomatic communications with Great Britain.

I further said that there was an endeavor in the British Case to

impute to the United States the view that Russia had acquired a sovereign dominion over that sea, intimating that the United States had originally based its position upon that view and had afterwards shifted its ground. That assertion I denied, and it was at that point that the Tribunal rose. It is my purpose now to support that denial, and to say that, from the first, the United States took but one position in reference to this matter and have retained it at all times during the controversy. In order to show this I call the attention of the Tribunal to Lord Salisbury's complaint, which will be found at page 162 of the first volume of the American Appendix. I have already referred to this letter, but it is important that I should now refer to it again. It was not the first time that the British Government protested against these seizures; but it was the first time that that Government stated the grounds of its complaint. Lord Salisbury had, prior to the writing of this letter, received from the American Government copies of the records of the United States District Court of Alaska, by which it appeared that the condemnations in that court were founded upon libels filed for the purpose of enforcing the American municipal law which forbade the taking of seals and by which it appeared also that the seizures had been effected at a greater distance than three miles from the shore. It is on this ground that Lord Salisbury conceives that the seizures were not justified. He explains that ground quite fully and closes his letter with these observations :

Her Majesty's Government feel sure that, in view of the considerations which I have set forth in this dispatch, which you will communicate to Mr. Bayard, the Government of the United States will admit that the seizure and condemnation of these British vessels and the imprisonment of their masters and crews were not warranted by the circumstances, and that they will be ready to afford reasonable compensation to those who have suffered in consequence, and issue immediate instructions to their naval officers which will prevent a recurrence of these regrettable incidents.

Mr. Bayard's first communication in relation to these seizures will be found at page 168. He then had before him the letter which I have just read of Lord Salisbury. He had before him the grounds upon which Lord Salisbury based his objection to these seizures; and he was invited therefore to a discussion of these grounds and reasons. As I have already remarked, Mr. Bayard thought proper to waive, or avoid, that discussion for the then present at least, and to rely upon conciliatory measures. The terms in which he did this will be found in the letter to which I now call your attention. As it is very short I will read it, although I have read it once before. These are instructions from him to the American Ministers abroad, the same letter being sent to the Ministers of several powers, Great Britain included.

Sir Charles Russell. My friend has not observed the dates; that is a month earlier than the date of the communication to Lord Salisbury. Lord Salisbury's letter is in August, and that is in September.

Mr. Carter. I am much obliged to my learned friend; he is entirely right. Let me withdraw the observation I have made that when Mr. Bayard wrote that letter he had before him the letter of Lord Salisbury which I have just read. He did not have it before him. He did have, however, before him the protests against the seizures which had been made to him by the British Minister in Washington.

He did have those before him. There were several letters from the British Minister and one of them, perhaps the first, was on the 27th of September, 1886. The next one is of the same character. The next is a communication from the Earl of Iddesleigh to Sir Lionel Sackville West; but it was also communicated to Mr. Bayard. That is on the 30th of October, 1886. As I have said, there was considerable delay on the part of Mr. Bayard in answering these documents of the British Government — delay arising from the circumstance that the place from which information was sought was so remote. Those observations will be sufficient to enable the learned Arbitrators to understand the view first taken in reference to the matter by Mr. Bayard, which is contained in the letter of August 19th, 1887 :

CORRESPONDENCE RELATIVE TO PROPOSED INTERNATIONAL
MEASURES FOR THE PROTECTION OF FUR-SEALS.

FRANCE.

Mr. Bayard to Mr. Vignaud ¹.

No. 256.]

DEPARTEMENT OF STATE.

Washington, August 19, 1887.

Sir : Recent occurrences have drawn the attention of this Department to the necessity of taking steps for the better protection of the fur-seal fisheries in Behring Sea.

Without raising any question as to the exceptional measures which the peculiar character of the property in question might justify this Government in taking, and without reference to any exceptional marine jurisdiction that might properly be claimed for that end, it is deemed advisable — and I am instructed by the President so to inform you—to attain the desired ends by international coöperation.

It is well known that the unregulated and indiscriminate killing of seals in many parts of the world has driven them from place to place, and, by breaking up their habitual resorts, has greatly reduced their number.

Under these circumstances, and in view of the common interest of all na-

¹. Identic instructions were sent to the United States ministers to Germany, Great Britain, Japan, Russia, and Sweden and Norway.

tions in preventing the indiscriminate destruction and consequent extermination of an animal which contributes so importantly to the commercial wealth and general use of mankind, you are hereby instructed to draw the attention of the Government to which you are accredited to the subject, and to invite it to enter into such an arrangement with the Government of the United States as will prevent the citizens of either country from killing seal in Behring Sea at such times and places, and by such methods as at present are pursued, and which threaten the speedy extermination of those animals and consequent serious loss to mankind.

The ministers of the United States to Germany, Sweden and Norway, Russia, Japan, and Great Britain have been each similarly addressed on the subject referred to in this instruction.

I am, etc.

T. F. BAYARD.

That was the first attitude taken by the Government of the United States towards the Government of Great Britain in reference to this question and to the questions which might be involved in it. Distinct discussion is avoided. All extreme assertions are waived in view of the conciliatory purposes for which it was written. Nevertheless the grounds upon which the Government would put its case are not indistinctly foreshadowed. They are that the property in question, of the seals, was of a peculiar nature, and that the proper protection of it might justify the exercise by the United States of an exceptional marine jurisdiction. No assumption of exclusive dominion over Bering Sea, or anything of the kind, is asserted.

That was the attitude which was taken by the United States during the administration of Mr. Cleveland and during what I have ventured to call, in giving an account of the whole controversy, the first stage of the controversy. The next stage of it is occupied with the dealings with the subject during the administration of President Harrison; and the first statement under that administration of the grounds upon which the United States based the assertion of its rights connected with the sealing industry was, as the learned Arbitrators will remember, set forth by Mr. Blaine in his note of January 22, 1890, which is found on page 200. That letter I have once read. It is quite long and I do not think it necessary to repeat the reading of it. It is, however, important to consider the substance of it, and I shall venture to state that, so far as it relates to the grounds taken by the United States.

That substance is this: That the seals are an animal in a high degree useful to mankind; that Russia engaged in the industry of preserving them, cherishing them, and taking the annual increase on the Pribylof Islands at a very early period; and that from the time when she first engaged in that industry down to the time of the cession to the United States, no other nation and no other people had ever attempted to interfere with that right; that the

United States acquired this industry together with the rest of their acquisition from Russia by the Treaty of 1867, and that the United States had carried on the same industry in substantially the same way without any interference by other nations, or other men, until the practice of pelagic sealing was introduced; that this practice of pelagic sealing was destructive of the seal and therefore destructive not only of this particular industry of the United States, but destructive of the interest which all mankind had in this animal; that it was a pure wrong — to use his phrase — *contra bonos mores*, and consequently the United States had a right to prevent this invasion of one of its own industries which was thus persisted in without any right whatever, and which was purely an assertion of a wrong. Those are the grounds taken by Mr. Blaine in this note. That is the same ground that the Government of the United States has asserted from the first and which it still continues to assert.

Now, in order to show that those grounds were perfectly well understood and especially by the British Government, I call attention to Lord Salisbury's note in answer to that of Mr. Blaine, which will be found on page 207. He undertakes to reduce to distinct points the several positions taken by Mr. Blaine in that long letter; and I will read so much of it :

Mr. Blaine's note defends the acts complained of by Her Majesty's Government on the following grounds :

1. That " the Canadian vessel arrested and detained in the Behring Sea were engaged in a pursuit that is in itself *contra bonos mores* — a pursuit which of necessity involves a serious and permanent injury to the rights of the Government and people of the United States."

2. That the fisheries had been in the undisturbed possession and under the exclusive control of Russia from their discovery until the cession of Alaska to the United States in 1867, and that from this date onwards until 1886 they had also remained in the undisturbed possession of the United States Government.

3. That it is a fact now held beyond denial or doubt that the taking of seals in the open sea rapidly leads to the extinction of the species, and that therefore nations not possessing the territory upon which seals can increase their numbers by natural growth should refrain from the slaughter of them in the open sea.

Mr. Blaine further argues that the law of the sea and the liberty which it confers do not justify acts which are immoral in themselves, and which inevitably tend to results against the interest and against the welfare of mankind; and he proceeds to justify the forcible resistance of the United States Government by the necessity of defending not only their own traditional and long established rights, but also the rights of good morals and of good government the world over.

I have no fault to find with that statement by Lord Salisbury. It exhibits a clear understanding of the position taken by Mr. Blaine and well enough described it, except in the last sentence where he

imputes to the United States Government an intention, or a disposition, to defend the rights of good morals and good government the world over. If he means they had asserted a right to undertake to do that, without reference to their own interest, the observation is not a correct one.

The next occasion on which Mr. Blaine dealt with the subject was in his letter of June 30, 1890, which is found on page 224. In that note he takes up the point, which Lord Salisbury had dealt with before, of Russian claims in Bering Sea, and undertakes to answer and refute Lord Salisbury's view in reference to it; but he does not in that letter in the slightest degree change the attitude which he had previously assumed in reference to pelagic sealing, so far as respected the ground upon which the Government of the United States based its views. He expressly takes care that it shall not be understood that the United States make any assertion of a right of *mare clausum* as to any part of Bering Sea. I read the paragraph of his letter from page 233. He says there :

The result of the protest of Mr. Adams, followed by the cooperation of Great Britain, was to force Russia back to 54°40' as her southern boundary. But there was no renunciation whatever on the part of Russia as to the Behring Sea, to which the ukase especially and primarily applied. As a piece of legislation this ukase was as authoritative in the dominions of Russia as an act of Parliament is in the dominions of Great Britain or an act of Congress in the territory of the United States. Except as voluntarily modified by Russia in the treaty with the United States, April 17, 1824, and in the treaty with Great Britain, February 16, 1825, the ukase of 1821 stood as the law controlling the Russian possessions in America until the close of Russia's ownership by transfer to this Government. Both the United States and Great Britain recognized it, respected it, obeyed it. It did not, as so many suppose, declare the Behring Sea to be *mare clausum*. It did declare that the waters, to the extent of 100 miles from the shores, were reserved for the subjects of the Russian Empire. Of course many hundred miles, east and west and north and south, were thus intentionally left by Russia for the whale fishery and for fishing, open and free to the world, of which other nations took large advantage. Perhaps in pursuing this advantage foreigners did not always keep 100 miles from the shore, but the theory of right on which they conducted their business unmolested was that they observed the conditions of the ukase.

But the 100-mile restriction performed the function for which it was specially designed in preventing foreign nations from molesting, disturbing, or by any possibility sharing in the fur trade. The fur trade formed the principal, almost the sole employment of the Russian American Company. It formed its employment, indeed, to such a degree that it soon became known only as the Russian American Fur Company, and quite suggestively that name is given to the Company by Lord Salisbury in the dispatch to which I am replying. While, therefore, there may have been a large amount of lawful whaling and fishing in the Behring Sea, the taking of furs by foreigners was always and under all circumstances illicit.

• He there asserts that it was not the purpose of the Ukase of 1821 to establish a *mare clausum*, as was by so many supposed,

but that its object was to preserve for the exclusive use and enjoyment by Russian subjects of the benefits of the fur trade, the 100-mile exclusion being an instrumentality for that purpose.

The next important note in the correspondence is that of August 2, 1890, by Lord Salisbury; but that again is confined to this discussion of Russian rights; and there is nothing, I believe pertinent to the point which I am now upon, namely, that of showing what the distinct attitude of the Government of the United States was. This was in the course of the correspondence and controversy between Mr. Blaine and Lord Salisbury concerning the extent of the Russian possessions and the extent to which they had been acquiesced in. To that Mr. Blaine rejoins in a letter beginning on page 263, and it is that letter which contains the single observation which might be taken as a justification for the statement that Mr. Blaine had put the American claims in the controversy upon the basis of an acquisition by Russia and a transmission to the United States of a sovereign dominion over Bering Sea. That observation I have already alluded to, but I will allude to it again. It is found on page 263:

The United States contends that the Behring Sea was not mentioned, or even referred to, in either treaty, and was in no sense included in the phrase "Pacific Ocean". If Great Britain can maintain her position that the Behring Sea at the time of the treaties with Russia of 1824 and 1825 was included in the Pacific Ocean, the Government of the United States has no well-grounded complaint against her. If, on the other hand, this Government can prove beyond all doubt that the Behring Sea, at the date of the treaties, was understood by the three signatory Powers to be a separate body of water, and was not included in the phrase "Pacific Ocean", then the American case against Great Britain is complete and undeniable.

Those observations standing alone might fairly be taken as indicating that Mr. Blaine had put the whole position of the United States in this controversy upon its ability to maintain that Russia had acquired by the Ukase of 1824, and other acts, sovereign authority and sovereign jurisdiction over Bering Sea. It is impossible that he could have intended it. I say it is impossible that he could have intended it, because it is utterly inconsistent with what he says in the same letter. I assume that he intended by that observation that if Great Britain succeeded in making out her case, the United States, *so far as that question was concerned*, would have no ground of complaint against her; and so, on the contrary, if the United States succeeded in making out her case, Great Britain, *so far as that question was concerned*, would have no just ground of complaint against the seizures; but that he did not mean to change his ground, becomes perfectly apparent from his more distinct assertions near the close of the same letter; and I must again read them.

The repeated assertions that the Government of the United States demands that the Behring Sea be pronounced *mare clausum*, are without foundation. The Government has never claimed it and never desired it. It expressly disavows it. At the same time the United States does not lack abundant authority, according to the ablest exponents of international law, for holding a small section of the Behring Sea for the protection of the fur-seals. Controlling a comparatively restricted area of water for that one specific purpose is by no means the equivalent of declaring the sea, or any part thereof, *mare clausum*. Nor is it by any means so serious an obstruction as Great Britain assumed to make in the South Atlantic, nor so groundless an interference with the common law of the sea as is maintained by British authority to day in the Indian Ocean. The President does not, however, desire the long postponement which an examination of legal authorities from Ulpian to Philimore and Kent would involve. He finds his own views well expressed by Mr. Phelps, our late minister to England, when, after failing to secure a just arrangement with Great Britain touching the seal fisheries, he wrote the following in his closing communication to his own Government, September 12, 1888 :

Much learning has been expended upon the discussion of the abstract question of the right of *mare clausum*. I do not conceive it to be applicable to the present case.

Here is a valuable fishery, and a large and, if properly managed, permanent industry, the property of the nations on whose shores it is carried on. It is proposed by the colony of a foreign nation, in defiance of the joint remonstrance of all the countries interested, to destroy this business by the indiscriminate slaughter and extermination of the animals in question, in the open neighboring sea, during the period of gestation, when the common dictates of humanity ought to protect them, were there no interest at all involved. And it is suggested that we are prevented from defending ourselves against such depredations because the sea at a certain distance from the coast is free.

The same line of argument would take under its protection piracy and the slave trade when prosecuted in the open sea, or would justify one nation in destroying the commerce of another by placing dangerous obstructions and derelicts in the open sea near its coasts. There are many things that can not be allowed to be done on the open sea with impunity, and against which every sea is *mare clausum*; and the right of self-defense as to person and property prevails there as fully as elsewhere. If the fish upon Canadian coasts could be destroyed by scattering poison in the open sea adjacent with some small profit to those engaged in it, would Canada, upon the just principles of international law, be held defenseless in such a case? Yet that process would be no more destructive, inhuman, and wanton than this.

If precedents are wanting for a defense so necessary and so proper, it is because precedents for such a course of conduct are likewise unknown. The best international law has arisen from precedents that have been established when the just occasion for them arose, undeterred by the discussion of abstract and inadequate rules.

Lord Salisbury in a note subsequent to this, on February 21st, 1891, again attempted to impute to Mr. Blaine a reliance, and a sole reliance, on Russian pretensions, instead of upon a principle of property right. That will be found on page 290. He says in a paragraph near the bottom of the page :

The claim of the United States to prevent the exercise of the seal fishery by other nations in Behring Sea rests now exclusively upon the interest which by purchase they possess in a ukase issued by the Emperor Alexander I, in the year 1824, which prohibits foreign vessels from approaching within 100 Italian miles of the coasts and islands then belonging to Russia in Behring Sea. It is not, as I understand, contended that the Russian Government, at the time of the issue of this ukase, possessed any inherent right to enforce such a prohibi-

tion, or acquired by the act of issuing it any claims over the open sea beyond the territorial limit of 3 miles which they would not otherwise have possessed. But it is said that this prohibition, worthless in itself, acquired validity and force against the British Government because that Government can be shown to have accepted its provisions. The ukase was a mere usurpation; but it is said that it was converted into a valid international law, as against the British Government, by the admission of that Government itself.

Now Lord Salisbury could not, I think, fairly, with the correspondence of Mr. Blaine before him, which I have already read, impute to the United States Government a sole reliance upon a jurisdiction asserted to have been acquired by Russia; but he attempts to do it there, and is very sharply corrected by Mr. Blaine in a subsequent note of April 14, 1891, which will be found on page 295. I read from page 298:

In the opinion of the President, Lord Salisbury is wholly and strangely in error in making the following statement:

Nor do they [the advisers of the President] rely, as a justification for the seizure of British ships in the open sea, upon the contention that the interests of the seal fisheries give to the United States Government any right for that purpose which, according to international law, it would not otherwise possess.

The Government of the United States has steadily held just the reverse of the position which Lord Salisbury has imputed to it. It holds that the ownership of the islands upon which the seals breed, that the habit of the seals in regularly resorting thither and rearing their young thereon, that their going out from the islands in search of food and regularly returning thereto, and all the facts and incidents of their relation to the island, give to the United States a property interest therein; that this property interest was claimed and exercised by Russia during the whole period of its sovereignty over the land and waters of Alaska; that England recognized this property interest so far as recognition is implied by abstaining from all interference with it during the whole period of Russia's ownership of Alaska, and during the first nineteen years of the sovereignty of the United States. It is yet to be determined whether the lawless intrusion of Canadian vessels in 1886 and subsequent years has changed the law and equity of the case theretofore prevailing.

And with that extract I conclude my observations concerning the attitude taken by the United States. From first to last it was based upon the assertion of a property interest in these seals, strengthened indeed by the allegation that that property interest had been originally held by Russia, and while held by Russia had been recognized by both Great Britain and the United States, and that the possession of this property interest by the United States gave it the right — a right which every Government has — to protect its property wherever that property has the right to be, and by such measures as are necessary for the purposes of such protection.

Now, then we have out of this case, as far as I am capable of putting out of it, any argument as to whether Russia ever acquired a sovereign jurisdiction over any part of Bering Sea, or whether

she ever transmitted to the United States any sovereign jurisdiction over any part of it. We make no assertion of that character. We put no part of our case upon any such assertion. We do not suppose that any such assertion of jurisdiction was ever made by Russia. But do I mean that this matter of Russian pretensions in Bering Sea, the rights which she may have asserted and acquired in those remote waters and which the United States may have acquired from her, have no place or importance in this controversy? No; I do not mean that. These pretensions do have a place, and an important place, which I am now about, so far as I am able, to vindicate for them. That is this: It could be hardly better expressed than Mr. Blaine has expressed it in the passage from which I last read:

That this property interest was claimed and exercised by Russia during the whole period of its sovereignty over the land and waters of Alaska; that England recognized this property interest so far as recognition is implied, by abstaining from all interference with it during the whole period of Russia's ownership of Alaska, and during the first nineteen years of the sovereignty of the United States.

Now, I am going to deal with this subject but very briefly. The question mainly turns upon what rights Russia did originally assume in Bering Sea, and whether those rights were ever displaced or modified by the subsequent treaties between her and the United States and between her and Great Britain in 1824 and 1825, and if displaced, or modified, to what extent. I am going to deal, I say very briefly, with that argument, and for two reasons: First, as I have already intimated, I do not conceive that it plays any vital part whatever in this controversy, and therefore I should do injustice to the general argument of the question if I should assign a disproportionate space to it; and I could not go through with the argument and refer to all the diplomatic communications and occasional acts of the various countries which have a bearing upon it without employing several days in the discussion. I have neither time nor strength for that and am not going into it. If I did do it, I could not implant such an impression of the particular incidents of the controversy as would enable you to remember it for any succession of days. It will be inevitable — it will be a task which the learned arbitrators will find it necessary to go through with — to examine this diplomatic correspondence and to examine the grounds taken by the American Government in the various communications upon this subject by Mr. Blaine. I could not lessen that labor materially by any lengthy discussion now. Nevertheless I must deal with it very briefly.

I have endeavored to point out in the sketch with which I began this part of my argument, the early dealing on the part of Russia

with Bering Sea and its coasts and Islands, and I think that I succeeded in showing that Russia prior to 1821 had appropriated to herself all the coasts and islands of that sea and all their resources so far as any nation could appropriate them ; that such appropriation was just and in accordance with natural law. There was enough only for one great nation, and the world would be best served by such exclusive appropriation. We do not assert an appropriation of the products of the sea unconnected with the shores. We assert no such appropriation on the part of Russia. Russia asserted the right to protect her trade and industries by the exercise of self-defensive authority upon the high seas and practically by excluding other nations from a belt of water extending 100 miles from the coasts and islands. She declared this to be, not an assumption of sovereignty, or *mare clausum*, or attempt to establish *mare clausum*, but a scheme of prevention ; in other words, a measure of self-defence. That assertion of authority was protested against, formed the subject of negotiation, and was eventually modified by treaties between Great Britain and the United States, severally, and Russia.

Now, except so far as the effect of the Ukase was thus modified, it stood, and stood assented to by Great Britain and the United States. The assent was indeed an implied one ; but the implication was sufficiently strong.

The inquiry then arises how far the assumption of authority by Russia in the Ukase of 1821 and her acts in support of it were modified or displaced by these subsequent treaties. In other words it involves the interpretation of the language and effect of these subsequent treaties. Now as the interpretation of these documents is not entirely easy upon the face of them, it will be proper to place ourselves in the possession of certain information in regard to the matters covered by the treaties, which will be found useful to us in the endeavor to ascertain what were the intentions of the parties to them.

The two sections of the Ukase which it is necessary to read will be found on page 16 of the first volume of our Appendix :

SEC. 1. — The pursuits of commerce, whaling, and fishery, and of all other industry on all islands, ports, and gulfs including the whole of the northwest coast of America, beginning from Behring's Straits to the 51° of northern latitude, also from the Aleutian Islands to the eastern coast of Siberia, as well as along the Kurile Islands from Behring's Straits to the South Cape of the Island of Urup, viz, to the 45°30' northern latitude, is exclusively granted to Russian subjects.

SEC. 2. — It is therefore prohibited to all foreign vessels not only to land on the coasts and islands belonging to Russia as stated above, but also to approach them within less than a hundred Italian miles. The transgressor's vessel is subject to confiscation along with the whole cargo.

Now it would seem that when the Government of Great Britain received information of that Ukase they applied to so eminent an authority as Lord Stowell to learn what the effect of it was, and he writes to Lord Melville on the 26th of December, 1821. I am reading from the Appendix to the Case of Great Britain, volume 2, page 12 :

Lord Stowell to Lord Melville.

GRAFTON STREET, LONDON,

December 26, 1821.

MY DEAR LORD : I have perused these papers, and it appears to me to be unsafe to proceed to any controversial discussion, of the proposed Regulations, till it is shown that they issue from a competent authority founded upon an acknowledged title of territorial and exclusive possession of the portions of the globe to which they relate. I am myself too slightly acquainted with the facts regarding such possession (how originally acquired and how subsequently enjoyed) to be enabled to say that upon undisputed principles such a possession exists. It is perfectly clear from these Regulations that it has not hitherto been exclusive in the extent in which it is now claimed ; for they are framed for the very purpose of putting an end to foreign intercourses of traffic therein, which they denominate illicit but which they admit existed *de facto*.

The territories claimed are of different species — islands — portions of the continent — and large portions of the sea adjoining.

I know too little of the history of their connection with either islands or continents to say with confidence that such a possession has in this case been acquired. I content myself with remarking that such possession does not appear in the opinion and practice of States to be founded exactly upon the same principles in the cases of islands and continents. In that of islands, discovery alone has usually been held sufficient to constitute a title. Not so in the case of continents. In the case of the South American Continent the Spaniards and Portuguese resorted to grants from an authority which in that age was universally respected, and continued in respect till subsequent possession had confirmed their title. But I think that it has not been generally held, and cannot be maintained that the mere discovery of a coast gives the right to the exclusive possession of a whole extensive continent to which it belongs, and less to the seas that adjoin to a very considerable extent of distance. An undisputed exercise of sovereignty over a large tract of such a continent and for a long tract of time would be requisite for such purposes. I am too ignorant of particular facts to say how far such principles are justly applicable to such cases. I observe that by these Regulations the commerce in these islands, continents and adjoining seas is declared to have been granted exclusively to Russian subjects : who the grantor is, is not expressly declared. If, as is probable, the Autocrat of Russia is meant, the inquiry then reverts to the question respecting the foundation of such an authority, and thinking that that question must be first disposed of, I content myself with observing upon the Regulations themselves that they are carried to an extent that appears very unmeasured and insupportable.

I have, etc.

STOWELL.

I read that letter for the purpose of showing two things : First,

the views of a distinguished jurist of that day upon the question of what right is acquired by the discovery of new regions, and what acts were necessary for the purpose of really constituting property in them; and next for the purpose of showing that Lord Stowell gathered at once from the face of these regulations that they were not designed as assuming sovereign jurisdiction over the sea, but were defensive regulations for the purpose of protecting commerce and the industries of a region over which it was assumed that Russia had sovereign control; and he, as you will perceive, rests the conclusion as to the validity of these regulations upon the completeness and perfectness of the sovereignty of the nation which had issued them over the shore. Right there I may also quote an opinion by Sir Robert Phillimore, evidently in reference to this very territory; because I think at an early period this whole territory, including Alaska, was vaguely understood by the world in general to be embraced under the term "Oregon". The passage from Sir Robert Phillimore's book, which I wish to refer to, is contained on page 39 of our Argument. He says (Int. Law, vol. 1, pp. 259, 260):

A similar settlement was founded by the British and Russian Fur Companies in North America.

The chief portion of the Oregon Territory is valuable solely for the fur-bearing animals which it produces. Various establishments in different parts of this territory organized a system for securing the preservation of these animals, and exercised for these purposes a control over the native population. This was rightly contended to be the only exercise of *proprietary right* of which these particular regions were at that time susceptible, and to mark that a *beneficial use* was made of the whole territory by the occupants.

That seems to me very reasonable and to tend very much to support the observations that I made at an early period of this argument to the effect that these Northern regions, producing only one product which could be easily gathered by one nation, were fully appropriated by Russia to herself by the colonial establishments which she had formed for that purpose. It was this pretension and under this aspect, which attracted the notice of Great Britain. In order to ascertain what her view was in reference to it and how far she complained of it — I speak of both Great Britain and the United States and how far they complained of it — we must look to the protests which were made. The first British protest in reference to it will be found on page 14 of the Appendix to the British Case, volume 2:

The Marquis of Londonderry to County Lieven.

FOREIGN OFFICE, January 18, 1852.

The undersigned has the honour hereby to acknowledge the note, addressed to him by Baron de Nicolai, of the 12th November last, covering a copy

of an Ukase issued by his Imperial Majesty the Emperor of all the Russias, and bearing date the 4th September, 1821, for various purposes, therein set forth, especially connected with the territorial rights of his Crown on the north-western coast of America, bordering upon the Pacific, and the commerce and navigation of His imperial Majesty's subjects in the seas adjacent thereto.

This document, containing Regulations of great extent and importance, both in its territorial and maritime bearings, has been considered with the utmost attention, and with those favorable sentiments which His Majesty's Governments always bear towards the acts of a State which His Majesty has the satisfaction to feel himself connected, by the most intimate ties of friendship and alliance; and having been referred for the report of those high legal authorities, whose duty it is to advise His Majesty on such matters.

The undersigned is directed, till such friendly explanations can take place between the two Governments as may obviate misunderstanding upon so delicate and important a point to make such provisional protest against the enactments of the said Ukase as may fully serve to save the rights of His Majesty's Crown, and may protect the persons and properties of His Majesty's subjects from molestation in the exercise of their lawful callings in that quarter of the globe.

The undersigned is commanded to acquaint Count Lieven that it being the King's constant desire to respect, and to cause to be respected by his subjects in the fullest manner, the Emperor of Russia's just rights, His Majesty will be ready to enter into amicable explanations upon the interests affected by this instrument, in such manner as may be most acceptable to His Imperial Majesty.

In the meantime, upon the subject of this Ukase generally, and especially upon the two main principles of claim laid down therein, viz., an exclusive sovereignty alleged to belong to Russia over the territories therein described, as also the exclusive right of navigating and trading within the maritime limits therein set forth, His Britannic Majesty must be understood as hereby reserving all his rights, not being prepared to admit that the intercourse which is allowed on the face of this instrument to have hitherto subsisted on those coasts, and in those seas, can be deemed to be illicit, or that the ships of friendly Powers, even supposing an unqualified sovereignty was proved to appertain to the Imperial Crown in these vast and very imperfectly occupied territories could by the acknowledged law of nations, be excluded from navigating within the distance of 100 Italian miles as therein laid down from the coast, the exclusive dominion of which is assumed (but, as His Majesty's Government conceive, in error) to belong to his Imperial Majesty the Emperor of all the Russias.

LONDONDERRY.

That protest would appear to be framed rather in the doubtful and indeterminate form suggested by Lord Stowell's observations upon the Ukase. It does, however, shadow forth rather vaguely complaints against this Ukase of a two-fold character. First, its assumption of territorial sovereignty over these shores, and, next, the attempt to exclude citizens of other nations from 100 miles on the sea, mentioning both the points. That is the first British protest. The American protest will be found on page 132 of the first volume of the Appendix to the Case of the United States. It seems that the Ukase was transmitted on the 11th of February, 1822, by

Mr. Poletica, the Russian Minister in Washington to Mr. Adams, the American Secretary of State at that time, and on the 25th Mr. Adams addresses this note to Mr. Poletica :

Mr. Adams to M. de Poletica.

DEPARTMENT OF STATE,
Washington, February 23, 1822.

SIR : I have the honor of receiving your note on the 11th instant, inclosing a printed copy of the regulations adopted by the Russian American Company, and sanctioned by His Imperial Majesty, relating to the commerce of foreigners in the waters bordering on the establishments of that company upon the northwest coast of America.

I am directed by the President of the United States to inform you that he has seen with surprise, in this edict, the assertion of a territorial claim on the part of Russia, extending to the fifty-first degree of north latitude on this continent, and a regulation interdicting to all commercial vessels other than Russian, upon the penalty of seizure and confiscation, the approach upon the high seas within 100 Italian miles of the shores to which that claim is made to apply. The relations of the United States with His Imperial Majesty have always been of the most friendly character; and it is the earnest desire of this Government to preserve them in that state. It was expected, before any act which should define the boundary between the territories of the United States and Russia on this continent, that the same would have been arranged by treaty between the parties. To exclude the vessels of our citizens from the shore, beyond the ordinary distance to which the territorial jurisdiction extends, has excited still greater surprise.

This ordinance affects so deeply the rights of the United States and of their citizens that I am instructed to inquire whether you are authorized to give explanations of the grounds of right, upon principles generally recognized by the laws and usages of nations, which can warrant the claims and regulations contained in it.

I avail, etc.,

JOHN QUINCY ADAMS.

That was the protest of the United States. It was answered by the Russian Minister M. de Poletica, in a note which is found on page 133, Volume I, of the Appendix to the Case of the United States and which I have already read and will therefore not repeat. I will observe in regard to it only that the Russian Minister in that note says that this Ukase is not an attempt to make the Bering Sea, or any part of it, *mare clausum*, but that it is adopted as a measure of prevention to protect the industries of Russia and her commerce on that sea.

Sir Charles Russell. We think that answer of de Poletica is very important, and we do not admit that that is a correct summary of it.

Mr. Carter. Do you prefer that it should be read in full.

Sir Charles Russell. Just as you please about that.

Mr. Carter. I am quite willing that it should be read now.

Sir Charles Russell. Oh no!

Mr. Carter. Negotiations at once began between Russia Great Britain and the United States in reference to the assumption of authority contained in this Ukase and they were at first jointly conducted. That appears in the correspondence here, and I will not take time to read the various letters in which it appears for the purpose of showing it; but it does sufficiently appear. Great Britain and the United States acted in conjunction, and each was consequently fully apprised of the views of the other. That common action continued for a considerable period of time in the negotiations and was finally broken off — broken off as I apprehend, and as I think is evident from the correspondence, because the United States Government had taken the attitude in the course of the correspondence that it would not recognize any further establishments of European powers on the North American continent — a suggestion of a doctrine subsequently known among statesmen as the Monroe doctrine. Mr. Monroe was then President of the United States. In consequence of that suggestion Great Britain withdrew from her joint action with the United States in the negotiation, but as I rather assume, and as I think is very natural and indeed evident, kept herself apprised of the course of the negotiations between Russia and the United States.

The President. Was there a formal declaration that they would cease acting jointly?

Mr. Carter. There was a formal declaration that they would cease acting jointly. I cannot now point to the particular letter; but that is the fact.

The President. And the motive given was the doctrine of President Monroe?

Mr. Carter. I am not able to say that was the reason given in the statement, but that I think was the fact. I may possibly be able to answer the question of the President. I cannot lay my hand at present upon the correspondence showing the grounds upon which Great Britain withdrew her participation.

The President. Perhaps it is not material to your argument.

Mr. Carter. Here is a note that perhaps throws light upon it. This is an extract from a letter from Mr. Rush, the American Minister in London to his own Government dated January 9, 1824. I read from the American State Papers, volume 5, p. 463.

Mr. Justice Harlan. Probably what you are looking for is on page 48 of volume 2 of the British Case, a letter from Mr. Canning to Sir Charles Bagot. There is some allusion there to it.

Mr. Carter. I will read this letter to which I refer :

*Extract of a letter from Mr. Rush, dated**London, January 9, 1824.*

I have heretofore written to you on the 6th and 22nd of December, and have now to inform you that from interviews which I have had with Mr. Canning since the present month set in, I find that he will decline sending instructions to Sir Charles Bagot to proceed jointly with our Government and that of Russia in the negotiation relative to the Northwest coast of America; but that he will be merely informed that it is now the intention of Great Britain to proceed separately.

Mr. Canning intimated to me that to proceed separately was the original intention of this Government, to which effect Sir Charles Bagot had been instructed, and never to any other; and that Sir Charles had only paused under your suggestions to him of its being the desire of our Government that the three powers should move in concert at St. Petersburg upon this subject.

The resumption of its original course by this Government has arisen chiefly from the principle which our Government has adopted, of not considering the American continents as subjects for future colonization by *any* of the European powers — a principle which Great Britain does not accede.

I have informed the Secretary of State of the above intention of this Government. It will produce no alteration in my endeavors to obtain in negotiation here a settlement of the points as between the United States and Great Britain, respecting the Northwest coast, in manner as my instructions lay them down to me.

And Mr. Canning's version of the same affair will be found on page 48 of volume 2 of the Appendix of the British Case. Mr. Canning says in a note to Sir Charles Bagot :

These reasons had induced us to hesitate very much as to the expediency of acceding to the proposition of the United States for a common negotiation between the three Powers; when the arrival of the Speech of the President of the United States at the opening of the Congress supplied another reason at once decisive in itself, and susceptible of being stated to Mr Rush with more explicitness than those which I have now detailed to your Excellency, I refer to the principle declared in that Speech, which prohibits any further attempt by European Powers at colonization in America.

So that the original action in common between Great Britain and the United States and the subsequent breaking up of that common action by Great Britain all appear to be quite evident. They are important however to my present argument only as showing that Great Britain and the United States, acting as they did originally in common, were at the start entirely well acquainted with the views of each other.

Now the next piece of evidence which it is important to notice in order to ascertain the views with which the two parties approached this negotiation — for that is what I am now upon — is to be found in the instructions issued to the negotiators. I call attention to the instructions from the United States Government which will be found in a letter from Mr. John Quincy Adams to Mr. Min-

ister Middleton on page 141, Vol. I, Appendix to the Case of the United States. I think I ought to read the whole of that letter.

Mr. Adams to Mr. Middleton.

No. 16.]

DEPARTMENT OF STATE,

Washington, July 22, 1823.

SIR : I have the honor of inclosing herewith copies of a note from Baron de Tuvill, the Russian minister, recently arrived, proposing, on the part of His Majesty the Emperor of Russia, that a power should be transmitted to you to enter upon a negotiation with the ministers of his Government concerning the differences which have arisen from the Imperial ukase of 4th (16th) September, 1821, relative to the northwest coast of America, and of the answer from this Department acceding to this proposal. A full power is accordingly inclosed, and you will consider this letter as communicating to you the President's instructions for the conduct of the negotiation.

From the tenor of the ukase, the pretensions of the Imperial Government extend to an exclusive territorial jurisdiction from the forty-fifth degree of north latitude, on the Asiatic coast, to the latitude of fifty-one north on the western coast of the American continent; and they assume the right of interdicting the navigation and the fishery of all other nations to the extent of 100 miles from the whole of that coast.

The United States can admit no part of these claims. Their right of navigation and of fishing is perfect, and has been in constant exercise from the earliest times, after the peace of 1783, throughout the whole extent of the Southern Ocean, subject only to the ordinary exceptions and exclusions of the territorial jurisdictions, which, so far as Russian rights are concerned, are confined to certain islands north of the fifty-fifth degree of latitude, and have no existence on the continent of America.

The correspondence between Mr. Poletica and this Department contained no discussion of the principles or of the facts upon which he attempted the justification of the Imperial ukase. This was purposely avoided on our part, under the expectation that the Imperial Government could not fail, upon a review of the measure, to revoke it altogether. It did, however, excite much public animadversion in this country, as the ukase itself had already done in England. I inclose herewith the North American Review for October, 1822, No. 37, which contains an article (p. 370) written by a person fully master of the subject; and for the view of it taken in England I refer you to the fifty-second number of the Quarterly Review, the article upon Lieutenant Kotzebue's voyages. From the article in the North American Review it will be seen that the rights of discovery, of occupancy, and of uncontested possession, alleged by Mr. Poletica, are all without foundation in fact.

It does not appear that there ever has been a permanent Russian settlement on this continent south of latitude 59°, that of New Archangel, cited by Mr. Poletica, in latitude 57°30', being upon an island. So far as prior *discovery* can constitute a foundation of right, the papers which I have referred to prove that it belongs to the United States as far as 59° north, by the transfer to them of the rights of Spain. There is, however, no part of the globe where the mere fact of discovery could be held to give weaker claims than on the northwest coast. "The great sinuosity", says Humboldt, "formed by the coast between the fifty-fifth and sixtieth parallels of latitude embraces discoveries made by Gali, Behring and Tchivikoff.

Quadra, Cook, La Perouse, Malespièr, and Vancouver. No European nation has yet formed an establishment upon the immense extent of coast from Cape Mendocino to the fifty ninth degree of latitude. Beyond that limit the Russian factories commence, most of which are scattered and distant from each other, like the factories established by the European nations for the last three centuries on the coast of Africa. Most of these little Russian colonies communicate with each other only by sea, and the new denominations of Russian America, or Russian possessions in the new continent, must not lead us to believe that the coast of Behring's Bay, the peninsula of Alaska, or the country of the Ischugatschi have become Russian *provinces* in the same sense given to the word when speaking of the Spanish provinces of Sonora or New Biscay". (Humboldt's New Spain, Vol. II, Book 3, chap. 8, p. 496.)

In Mr. Poletica's letter of 28th February, 1822, to me, he says that when the Emperor Paul I granted to the present American Company its first charter, in 1799, he gave it the *exclusive possession* of the northwest coast of America, which belonged to Russia, from the fifty-fifth degree of north latitude to Behring Strait.

In his letter of 2d of April, 1822, he says that the charter of the Russian American Company, in 1799, was merely conceding to them a part of the sovereignty, or, rather, *certain exclusive privileges of commerce*.

This is the most correct view of the subject. The Emperor Paul granted to the Russian American Company certain exclusive privileges of commerce — exclusive with reference to other Russian subjects; but Russia had never before *asserted* a right of sovereignty over any part of the North American continent, and in 1799 the people of the United States had been at least for twelve years in the constant and uninterrupted enjoyment of a profitable trade with the natives of that very coast, of which the ukase of the Emperor Paul could not deprive them.

It was in this same year, 1799, that the Russian settlement at Sitka was first made, and it was destroyed in 1802 by the natives of the country. There were, it seems, at the time of its destruction, three American seamen who perished with the rest, and a new settlement at the same place was made in 1804.

In 1808 Count Romanzoff, being then Minister of Foreign Affairs and of Commerce, addressed to Mr. Harris, consul of the United States at St. Petersburg, a letter complaining of the traffic carried on by citizens of the United States with the native islanders of the northwest coast, *instead* of trading with the Russian possessions in America. The Count stated that the Russian Company had represented this traffic as *clandestine*, by which means the savage *islanders*, in exchange for otter skins, had been furnished with firearms and powder, with which they had destroyed a Russian fort, with the loss of several lives. He expressly disclaimed, however, any disposition on the part of Russia to abridge this traffic of the citizens of the United States, but proposed a convention by which it should be carried on *exclusively* with the agents of the Russian American Company at Kadiak, a small island near the promontory of Alaska, at least 700 miles distant from the other settlement at Sitka.

On the 4th of January, 1810, Mr. Daschkoff, chargé d'affaires, and consul general from Russia, renewed this proposal of a convention, and requested as an alternative that the United States should, by a legislative act, prohibit the trade of their citizens with the natives of the northwest coast of America as *unlawful and irregular*, and thereby induce them to carry on the trade exclusively with the agents of the Russian American Company. The answer of the Secretary of State, dated the 5th of May, 1810, declines those proposals for reasons which were then satisfactory to the Russian Government, or to

which at least no reply on their part was made. Copies of these papers and of those containing the instructions of the minister of the United States then at St. Petersburg, and the relation of his conferences with the chancellor of the empire, Count Romanzoff, on this subject are herewith inclosed. By them it will be seen that the Russian Government at that time explicitly declined the assertion of *any* boundary line upon the northwest coast, and that the proposal of measures for confining the trade of the citizens of the United States exclusively to the Russian settlement at Kadiak and with the agents of the Russian American Company had been made by Count Romanzoff under the impression that they would be as advantageous to the interests of the United States as to those of Russia.

It is necessary now to say that this impression was erroneous; that the traffic of the citizens of the United States with the natives of the northwest coast was neither *clandestine*, nor unlawful, nor irregular; that it had been enjoyed many years before the Russian American Company existed, and that it interfered with no lawful right or claim of Russia.

This trade has been shared also by the English, French, and Portuguese. In the prosecution of it the English settlement of Nootka Sound was made, which occasioned the differences between Great Britain and Spain in 1789 and 1790, ten years before the Russian American Company was first chartered.

It was in the prosecution of this trade that the American settlement at the mouth of the Columbia River was made in 1811, which was taken by the British during the late war, and formally restored to them on the 6th of October, 1818. By the treaty of the 22d of February, 1819, with Spain, the United States acquired all the rights of Spain north of latitude 42°; and by the third article of the convention between the United States and Great Britain of the 20th of October, 1818, it was agreed that any country that might be claimed by either party on the northwest coast of America, westward of the Stony Mountains, should, together with its harbors, bays, and creeks, and the navigation of all rivers within the same, be free and open for the term of ten years from that date to the vessels, citizens, and subjects of the two powers, without prejudice to the claims of either party or of any other State.

You are authorized to propose an article of the same import for a term of ten years from the signature of a joint convention between the United States, Great Britain, and Russia.

The right of the United States from the forty-second to the forty-ninth parallel of latitude on the Pacific Ocean we consider as unquestionable, being founded, first, on the acquisition, by the treaty of February 22, 1819, of all the rights of Spain; second, by the discovery of the Columbia River, first from sea, at its mouth, and then by land, by Lewis and Clarke; and third, by the settlement at its mouth in 1811. This territory is to the United States of an importance which no possession in North America can be to any European nation, not only as it is but the continuity, of their possessions from the Atlantic to the Pacific Ocean, but as it offers their inhabitants the means of establishing hereafter water communications from the one to the other.

It is not conceivable that any possession upon the continent of North America should be of use or importance to Russia for any other purpose than that of traffic with the natives. This was, in fact, the inducement to the formation of the Russian-American Company and to the charter granted them by the Emperor Paul. It was the inducement to the ukase of the Emperor Alexander. By offering free and equal access for a term of years to navigation and intercourse with the natives to Russia, within the limits to which our claims are indisputable, we concede much more than we obtain. It is not to be doubted that, long before the expiration of that time, our settlement at the mouth of the Columbia River will become so considerable as to offer means

of useful commercial intercourse with the Russian settlements on the islands of the northwest coast.

With regard to the territorial claim, separate from the right of traffic with the natives and from any system of colonial exclusions, we are willing to agree to the boundary line within which the Emperor Paul had granted exclusive privileges to the Russian American Company, that is to say, latitude 55°.

If the Russian Government apprehend serious inconvenience from the illicit traffic of foreigners with their settlements on the northwest coast, it may be effectually guarded against by stipulations similar to those, a draft of which is herewith subjoined, and to which you are authorized, on the part of the United States, to agree.

As the British ambassador at St. Petersburg is authorized and instructed to negotiate likewise upon this subject, it may be proper to adjust the interests and claims of the three powers by a joint convention. Your full power is prepared accordingly.

Instructions conformable to these will be forwarded to Mr. Rush, at London, with authority to communicate with the British Government in relation to this interest and to correspond with you concerning it, with a view to the maintenance of the rights of the United States.

I am, etc.,

JOHN QUINCY ADAMS.

HENRY MIDDLETON,

*Envoy Extraordinary and Minister Plenipotentiary
of the United States, St. Petersburg.*

[Inclosure.]

Draft of treaty between the United States and Russia.

ART. I. In order to strengthen the bonds of friendship and to preserve in future a perfect harmony and good understanding between the contracting parties, it is agreed that their respective citizens and subjects shall not be disturbed or molested, either in navigating or in carrying on their fisheries in the Pacific Ocean or in the South Seas, or in landing on the coasts of those seas, in places not already occupied, for the purpose of carrying on their commerce with the natives of the country; subject, nevertheless to the restrictions and provisions specified in the two following articles.

ART. II. To the end that the navigation and fishery of the citizens and subjects of the contracting parties, respectively, in the Pacific Ocean or in the South Seas, may not be made a pretext for illicit trade with their respective settlements, it is agreed that the citizens of the United States shall not land on any part of the coast actually occupied by Russian settlements, unless by permission of the governor or commander thereof, and that Russian subjects shall, in like manner, be interdicted from landing without permission at any settlement of the United States on the said northwest coast.

ART. III. It is agreed that no settlement shall be made hereafter on the northwest coast of America by citizens of the United States or under their authority, north, nor by Russian subjects, or under the authority of Russia, south of the fifty-fifth degree of north latitude.

(For other inclosures, see American State Papers, Foreign Relations, vol. v, pp. 436-438.)

Now the learned Arbitrators will perceive from that letter, which is very instructive in reference to the views of the United States Government at that time, that the only serious and practical objection on the part of the United States to whatever pretensions were set up by Russia in this Ukase of 1821, were two : first, that she

should have extended her territorial pretensions from $54^{\circ} 40'$, where they stood under the charter to the Russian American Company of 1799, down to 51 degrees of North latitude; and, second, to her exclusion from the Northwest coast of the United States citizens engaged in trade; in other words, the exclusion of them from the benefits of the trade on this Northwest coast. The maritime pretension contained in the Ukase of 1821 was indeed alluded to and objected to; but it forms no substantial part of the objections which are so carefully urged by Mr. Adams.

The substance of the objections urged by Mr. Adams are these: that the trade along this Northwest coast, by which he means the coast extending from, say 60 degrees of north latitude, down to the mouth of the Columbia River, had been for years in the enjoyment of various powers, of Russia, of the United States, of Great Britain, of Spain and of Portugal; that they had all, to a greater or less degree, engaged in that trade; that the United States had engaged in it from the time that she had become an independent nation; and that her right to a participation in that trade was entirely well founded, as Mr. Adams insisted. Now, that had reference to this coast along which I run the pointer [indicating on the map], and had no reference at all to Bering Sea, or to any of the islands of Bering Sea, or to the coast of Siberia — regions which, so far as respected their coasts, or any trading upon the coasts, had never been visited by the vessels of the United States; and no thought had ever been entertained of engaging in such a commerce. The United States claimed title, according to this statement by Mr. Adams, up to the 59th degree, the present boundary of British Columbia. At that time Great Britain and the United States were of course in dispute as to whom this coast here (indicating on map) belonged to; and it] was not until the year 1846 that that dispute was settled by the adoption of the present boundary.

The President. On page 142 of the report of Mr. Adams from which you have just read, they speak of the 59th degree north as being the claim of the United States. I suppose it is a misprint.

Mr. Carter. No, that is the point up to which the United States claimed. It would be where my pointer now is, up to the southern boundary of Alaska, a line which would take the whole of the peninsula.

That was a claim which made this territory in part a disputed one. The case which Mr. Adams made here by these instructions was this: "Spain is the first discoverer up to the 60 degree of North latitude. We have her rights transferred to us. Therefore by first discovery, we have a title to latitude 60. In the next place we have always engaged in trade on that coast; have visited it con-

tinually ever since we were an independent nation, and such rights as we have springing out of trade with the coast, added to the rights of prior discovery, constitute a title upon which we can make a dispute with Russia ”.

So that we see from this letter of Mr. Adams, and from his instructions to the American negotiator of the Treaty, that practically the whole importance of the dispute lay in the possession of that Northwest coast. That is all there was about it. There was indeed a sentimental assertion — I call it a sentimental one — that no further acquisition, no further settlements by European powers upon the American continent, would be permitted; but that did not amount to much, for in the very letter he offered to draw a boundary line with Russia at 55 degrees which would give her exclusive possession of a very considerable part of this disputed region. Practically the whole of the interests that were affected by this dispute centred upon that Northwest coast trade. And I might as well here strengthen that point. Mr. Adams, you will remember, refers in that letter of instructions to two articles in certain well-known periodicals of that time as containing very correct information about this region. He refers to an article in the *Quarterly Review*, and to an article in the *North American Review*. Here is an extract from the article thus referred to in the *Quarterly Review*. It will be found on page 12 of the first volume of our appendix :

Let us examine, however, what claim Russia can reasonably set up to the territory in question. To the two shores of Bering Sea we admit she would have an undoubted claim, on the scope of priority of discovery, that on the side of Asia having been visited by Deshnew in 1648, and that of America visited by Bering in 1741, as far down as the latitude 51° and the peaked mountain, since generally known by the name of Cape Fairweather; to the southward of this point, however, Russia has not the slightest claim.

That is carrying the position and claim of Russia under the claim of prior discovery much farther south than the 60th degree.

Here is the extract from the *North American Review*. That article in the *North American Review*, I may say — and I do not know but there is some evidence of it in these papers — was I think I may undertake to say, written by Mr. William Sturgis of Boston, a very distinguished merchant of that day, of the firm of Bryant, Sturgis and Company, who carried on an extensive trade on this very coast; and he had himself been, as a member of that house and engaged in this navigation, many years on that coast. It was perfectly familiar to him, with its history, and with the trade which had arisen there. It is also on page 12 :

We have no doubt but Russian fur-hunters formed establishments, at an

early period, on the Aleutian Islands and neighboring coast of the continent; but we are equally certain that it can be clearly demonstrated that no settlement was made eastward of Bering Bay till the one at Norfolk Sound (Sitka), in 1799. The statements of Cook, Vancouver, Mears (Mirs), Portlock, and La Perouse prove, what we readily admit, that previous to 1786 the Russians had settlements on the island of Kadiak and in Cook's River; but we shall take leave to use the same authorities to establish the fact that none of these settlements extended so far east as Bering Bay.

[The Tribunal here took a recess.]

Mr. Carter. Mr. President, the diplomatic papers, and especially the instructions from Secretary John Quincy Adams to the American negotiator of the Treaty with Russia and the historical evidence referred to in that letter and other historical evidence which was alluded to by me, establish, as it seems to me, without question, that, so far as the United States was concerned, her objections to the Ukase of 1821 were substantially confined to the unwarranted assertion of authority on the part of Russia — for such the United States deemed it to be — over the North-west Coast, where the United States had very valuable commercial interests. And it appears equally clear that, so far as the possessions of Russia north of the 60th parallel of north latitude, which includes the whole of Alaska and the whole of Bering Sea and the Aleutian Islands, the title of Russia to the possession and enjoyment of those territories was undisputed and constituted no subject of complaint on the part of the United States; and that, so far as respects the assertion of maritime dominion contained in the Ukase of 1821, while the United States made a formal objection to it, it did not figure prominently as an objection on their part, or make any considerable figure in the discussion. It was under those circumstances and with those views on the part of the United States and on the part of Russia that the Treaty of 1824 was concluded, and the question now is as to the interpretation of that Treaty. Its provisions will be found on page 36, of the first volume of the Appendix to the American Case (quoting) :

ART. I. It is agreed that, in any part of the Great Ocean, commonly called the Pacific Ocean, or South Sea, the respective citizens or subjects of the high contracting Powers shall be neither disturbed nor restrained, either in navigation or in fishing, or in the power of resorting to the coasts, upon points which may not already have been occupied, for the purpose of trading with the natives, saving always the restrictions and conditions determined by the following articles.

ART. II. With a view of preventing the rights of navigation and of fishing exercised upon the Great Ocean by the citizens and subjects of the high contracting Powers from becoming the pretext for an illicit trade, it is agreed that the citizens of the United States shall not resort to any point where there is a Russian establishment, without the permission of the

governor or commander; and that, reciprocally, the subjects of Russia shall not resort, without permission, to any establishment of the United States upon the Northwest coast.

That is the important part of the Treaty of 1824, so far as the present discussion is concerned; and the question is, whether the terms "Pacific Ocean" or "South Sea" include Bering Sea or exclude it. It is insisted on the part of Great Britain that they include it it is insisted on the part of the United States that they do not; and we have to inquire which is the more reasonable interpretation under the circumstances of the case, and in view of all the lights which are thrown by the evidence concerning the understanding of the parties to the Treaty. Now, it is apparent at the start that that article of the Treaty admits of either interpretation upon its face. "Pacific Ocean" or "South Sea" may include the whole of Bering Sea, as is insisted by Great Britain; and, on the other hand, it may exclude it, as is insisted by the United States. What is the consequence of accepting the interpretation insisted upon by Great Britain? It would be that the United States is, by the terms of that Treaty, permitted to land on all the coasts of the Pacific Ocean including Bering Sea, under the supposed dominion of Russia, including the whole of the coast of Siberia, of the coast of Alaska and of the islands in the Bering Sea: that is the consequence of this interpretation. On the other hand, if the interpretation insisted upon by the United States is correct, "Pacific Ocean" only applies to that part of the Pacific Ocean which is south of the Aleutian Islands, and which, therefore, washes only this disputed territory along here (pointing to the map).

Its application on the other side of the Pacific, would be extremely limited. Well now, we have to say that the interpretation insisted upon by Great Britain is in a high degree improbable and unreasonable. Why? Because it gives up at once to the United States what the United States never asked for, and that is a right to resort to the coasts of Bering Sea and the islands in Bering Sea. It surrenders the pretension on the part of Russia which had never prior to that time been challenged; and it gives and surrenders that important right to the United States without any consideration, so far as I am able to see. Why should we suppose that Russia intended in these negotiations to give to the United States a right to resort to her coasts and her islands which the United States never asked for? Why should we suppose that there was on the part of Russia a design to abandon a pretension which the United States never denied? My first point is that the pretension insisted upon by Great Britain is unreasonable upon its face, and that we should not accept it, unless the language on

the face of the Treaty is such as to compel that acceptance. Now, when we return to the language of the Treaty, we at once find reason for the belief that the term "Pacific Ocean" was not intended to cover such a broad expanse. The language is (quoting) :

"It is agreed that in any part of the great Ocean... *commonly called* the Pacific Ocean or South Sea."

Those words "commonly called" are not destitute of significance; they were not inserted here without a purpose. Did the Pacific Ocean, as spoken of in that age, include Bering Sea? What do we mean by "commonly called"? Does it import the meaning assigned to it by distinguished geographers? Is that what is meant by "commonly called"? No, I imagine not. The expression means that which is called the South Pacific Ocean or South Sea by common men engaged in fishing or navigation; and I apprehend that, if seamen, navigators, masters of vessels, commercial firms engaged in business and resorting to that sea, were asked whether the expression included Bering Sea or not, they would say no. Therefore, I think it was intended by the use of the words "commonly called," to limit the term "Pacific Ocean" to that which was understood by it according to common usage among the men of that time who were in the habit of using that term in their business relations. Now let us look at the maps of that day, for there are a multitude of them referred to in the Cases of the contending parties. As to the majority of these maps, I think I may say nearly all of them—I do not wish to make a positive assertion; I have not made an accurate study of it—but as to the vast majority of them, Bering Sea is represented as a sea by itself, sometimes called Bering Sea, sometimes the Northern Ocean, sometimes the Sea of Kamchatka, but generally represented upon all the maps of the time as a sea separate and by itself. I cannot help thinking, therefore, that if it was the intention of these parties, of these Governments, to embrace by the terms of this Treaty the coasts and islands of the Bering Sea, they would have used some language expressly and unequivocally indicating this, and that we should not infer that Russia has made a surrender without consideration of her unquestioned rights along the shores of the whole of Bering Sea, unless language is found in the Treaty unequivocally importing that fact. So much as to the face of the Treaty itself, and it seems to me that the argument is very strong—I will not say it is absolutely conclusive, for this is a subject which admits of argument on both sides—that the phrase "Ocean commonly called the Pacific Ocean or South Sea" was, in the minds of those two agreeing Governments, limited to the Pa-

cific Ocean south of Alaska and the Aleutian Islands and the Bering Sea. Now I come to a point which seems to me quite conclusive of this question — the learned Arbitrators will bear in mind that I am discussing the meaning of these terms in the American Treaty — and I now come to certain considerations which appear to me to be quite conclusive of the question. After this Treaty had been finally concluded, but before it had been ratified, its terms came to the knowledge of this Russian-American Company which had by grants from Russia the exclusive right to all the industries in Bering Sea. That Company perceived, or thought it perceived, that it might be asserted at some time on the part of the United States and its citizens that, by the language of the Treaty, the Russian industries in Bering Sea were to some extent thrown open to the citizens of the United States; and in consequence of that apprehension they made a communication to their own Government; and I call attention to a letter from the Minister of Finance of the Russian Government to the Board of Administration of the Russian-American Company answering that communication, which appears on page 155 of the Counter Case of the United States. This letter was written from St. Petersburg, September 4th, 1824.

The communication of June 12, 1824, presented to me by the directors of the company, containing their remarks on the consequences which may result from the ratification of the convention concluded April 5, 1824, between our Court and the North American Republic, was communicated by me at that time in the original to the minister in charge of the Ministry of Foreign Affairs. Having now received from him the information that the recorded protocol of the proceedings of the special committee which examined this subject by imperial order has received the full and entire approval of His Imperial Majesty, I think it necessary to communicate to the board of administration of the Russian American Company, for their information, copies of the above-mentioned communication of Count Nesselrode to me, and also the proceedings of the committee of July 21, 1824, inclosed in it, together with a draft of a communication to me, prepared by His Excellency; which was also read in the above-named committee and was left unsigned after it had been given final consideration.

From these documents the board will see that, for the avoidance of all misunderstandings in the execution of the above-mentioned convention, and in conformity with the desire of the company, the necessary instructions have already been given to Baron Tuyll, our minister at Washington, to the effect that the northwestern coast of America, along the extent of which, by the provisions of the convention, free trading and fishing are permitted subjects of the North American States, extends from 54° 40' northwards to Yakutat (Bering's) Bay.

Lieut. Gen. KANKRIN,
Minister of Finance.

Y. DRUSHININ,
Director.

That shows the interpretation placed by the Government of

Russia at that time upon the phrase used in the Treaty. The letter encloses the abstract of a communication from Count Nesselrode to the Minister of Finance. Count Nesselrode had to do with the negotiations and conclusion of the Treaty. Now, that communication is quite a long one, and I shall not read the whole of it; but I call attention to the concluding passages of it at page 138 :

But seeing, on the other hand, that the restrictions stated in the opinion of the Minister of Finance and of State Councilor Drushinin put an end to all the complaints of the American Company, the majority of the members of the committee have found it necessary to investigate the nature of those restrictions, in order to ascertain how far it is possible to insist upon them without prejudice to the rights and advantages accruing from the treaty of April 5-17.

As the proposed restrictions refer to two chief points lying under different parallels of latitude, namely :

First. To Yakutat (Bering's) Bay, under parallel 59° 30'.

Second. To Cross Bay or Sound (Cross Sound) under parallel 57° — the American Company desires that subjects of the United States may not be permitted to hunt or fish in those bays; therefore, the majority of the members of the committee resolve :

That, as regards the first of these points (Bering's Bay), it lies in a latitude where the rights of Russia have never formed a subject of dispute, and that this important circumstance permits us to include it in the general declaration concerning the Aleutian Islands and the other northern places.

That, as regards the second (Cross Sound), however, as it lies under the fifty-seventh degree of north latitude, and consequently within the limits of those islands and regions to which Russia's right of sovereignty has been disputed, it is impracticable to apply the same rule or to base the claim, of which it must be the subject, on any other satisfactory proof.

That apart from this, in order to exhaust all the measures showing the care of the Government of His Imperial Majesty for the interests of the Russian American Company, it is still possible to instruct Gen. Tuyl to use every effort to persuade the Washington Cabinet that, by accepting this restriction relating to Cross Sound, it will prevent all unpleasant collisions between the subjects of the two powers. That Gen. Tuyl must not, however, make this last proposition until he is convinced that it will be accepted, and that it will not deter the Government of the United States from ratifying the treaty of April 5-17.

This resolution was unanimously adopted by all the members of the committee.

St. Petersburg, July 21, 1824.

NESSELRODE.
G. L. KANKRIN.
SPERANSKY.
DRUSHININ.
POLETICA.

Sir Charles Russell. This is the first occasion on which a document has been referred to, the correctness of which is impugned. It is well that I should call the attention of the Tri-

bunal at once to it. My friend has read "together with a draft of communications to him prepared by His Excellency, which was also read by the above named." That is an interpolated passage and is not in the original. Oh! I beg your pardon; I misunderstood; those are omitted in the translation, but are in the original. What my friend read was not the amended translation.

Mr. Justice Harlan. At the top of the page from which Mr. Carter read we have the words "amended translation."

Mr. Carter. That communication on the part of the officers of the Russian Government intimates the interpretation of the Treaty which I have suggested to the Tribunal — that, so far as regards places north of the 60th parallel of latitude or thereabouts, they are not regions which were ever the subject of dispute, and therefore the exclusive right of Russia to them is not affected by the Treaty; but that, so far as relates to lands south of that latitude, they belong to regions which were subject to dispute and therefore come under the provisions of that Treaty. And I ought also to have stated to the Arbitrators, as another ground for supporting that interpretation of the Treaty which I had insisted upon, that the important articles of the Treaty, articles II, III and IV, all refer manifestly and plainly to that Northwestern coast, which is another reason for limiting the meaning of the phrase "Pacific Ocean" to that part of the Pacific Ocean which washes that coast. We see from the papers which I have read and which emanated from the Russian Government the interpretation which that Government put upon this term.

I read also paragraph 7, on page 157, Proceedings of the Conference held June 1, 1824 :

That as the sovereignty of Russia over the coasts of Siberia and the Aleutian Islands has long been admitted by all the powers, it follows that the said coasts and islands cannot be alluded to in the articles of the said treaty, which refers only to the disputed territory on the Northwest coast of America and to the adjacent islands; that, even supposing the contrary, Russia has established permanent settlement, not only on the coast of Siberia, but also on the Aleutian group of islands; hence American subjects could not by virtue of the second article of the treaty of April 5-17, land at the maritime places there nor carry on sealing and fishing without the permission of our commandants or governors. Moreover, the coasts of Siberia and the Aleutian islands are not washed by the Southern Sea, of which alone mention is made in the first article of the treaty, but by the Northern Ocean and the Seas of Kamchatka and Okotsk, which form no part of the Southern Sea or any known map on any geography.

The President. Those are the proceedings of the Russian officials; there is nothing international about them.

Mr. Carter. Not at all; but the learned Arbitrators will per-

ceive from the paper which I am about to read that those very views were brought to the attention of the American Government and acquiesced in, and that before the ratification of the Treaty. It will be remembered that in the documents from which I have just read allusion was made to instructions given to Baron Tuyl to bring this subject to the attention of the American Government. Mr. Adams was at that time Secretary of State, and he records in his Diary of December 6, 1824, the fact of an interview between him and Baron Tuyl. This occurs at page 276, volume I, of the American Appendix (quoting) :

6th, Monday. — Baron Tuyl, the Russian Minister, wrote me a note requesting an immediate interview, in consequence of instructions received yesterday from his Court. He came, and after intimating that he was under some embarrassment in executing his instructions, said that the Russian-American Company, upon learning the purport of the Northwest Coast convention concluded last June by Mr. Middleton, were extremely dissatisfied (*a jeté de hauts cris*), and, by means of their influence, had prevailed upon his Government to send him these instructions upon two points. One was that he should deliver, upon the exchange of the ratifications of the convention, an explanatory note purporting that the Russian Government did not understand that the convention would give liberty to the citizens of the United States to trade on the coast of Siberia and the Aleutian Islands. The other was to propose a modification of the convention, by which our vessels should be prohibited from trading on the Northwest Coast north of latitude 57°. With regard to the former of these points he left with me a minute in writing.

Now turning to page 277, I continue the extract from Mr. Adams Diary (quoting) :

I told Baron Tuyl that we should be disposed to do everything to accommodate the views of his Government that was in our power, but that a modification of the convention *could* be made no otherwise than by a new convention, and that the construction of the convention as concluded belonged to other departments of the Government, for which the Executive had no authority to stipulate..... I added that the convention would be submitted immediately to the Senate; that if anything affecting its construction, or, still more, modifying its meaning, were to be presented on the part of the Russian Government before or at the exchange of the ratifications, it must be laid before the Senate, and could have no other possible effect than of starting doubts, and, perhaps, hesitation, in that body, and of favoring the views of those, if such there were, who might wish to defeat the ratification itself of the convention..... If, therefore, he would permit me to suggest to him what I thought would be his best course, it would be to wait for the exchange of the ratifications, and make it purely and simply; that afterwards, if the instructions of his Government were imperative, he might present the note, to which I now informed him what would be, in substance, my answer. It necessarily could not be otherwise. But, if his instructions left it discretionary with him, he would do still better to inform his Government of the state of things here, of the purport of our conference, and of what my answer must be if he should present the note. I believed his Court would then deem it best that he should not present the note at all. *Their apprehension had been excited by an interest not very friendly to the good understanding between the United States and Russia. Our merchants*

would not go to trouble the Russians on the coast of Siberia, or north of the fifty-seventh degree of latitude, and it was wisest not to put such fancies into their heads. At least the Imperial Government might wait to see the operation of the convention before taking any further step, and I was confident they would hear no complaint resulting from it. If they should, then would be the time for adjusting the construction or negotiating a modification of the convention.

Now, the Explanatory Note which the Baron contemplated forwarding is the following :

Explanatory note to be presented to the Government of the United States at the time of the exchange of ratifications, with a view to removing with more certainty all occasion for future discussions; by means of which note it will be seen that *the Aleutian Islands, the coasts of Siberia, and the Russian Possessions in general on the Northwest Coast of America to 59° 30' of north latitude* are positively excepted from the liberty of hunting, fishing, and commerce stipulated in favor of citizens of the United States for ten years.

This seems to be only a natural consequence of the stipulations agreed upon, for *the coasts of Siberia* are washed by the Sea of Okhotsk, the Sea of Kamschatka, and the Icy Sea, and *not by the South Sea* mentioned in the first article of the convention of April 5-17 [1824]. *The Aleutian Islands* are also washed by the Sea of Kamchatka, or Northern Ocean.

It is not the intention of Russia to impede the free navigation of the Pacific Ocean. She would be satisfied with causing to be recognized, as well understood and placed beyond all manner of doubt, the principle that beyond 59°30' no foreign vessel can approach her coasts and her islands, nor fish nor hunt within the distance of two marine leagues. This will not prevent the reception of foreign vessels which have been damaged or beaten by storm.

That was the Note which was to be presented. Now I read a further extract from Mr. Adams's diary :

The Baron said that these ideas had occurred to himself; that he had made this application in pursuance of his instructions, but he was aware of the distribution of powers in our Constitution and of the incompetency of the Executive to adjust such questions. He would therefore wait for the exchange of the ratifications without presenting his note, and reserve for future consideration whether to present it shortly afterwards or to inform his Court of what he has done and ask their further instructions upon what he shall definitely do on the subject.

Sir Charles Russell. There is a passage following that — the passage is this (reading) :

He therefore requested me to consider what had now passed between us as if it had not taken place ('non avenu'), to which I readily assented, assuring him, as I had done heretofore, that the President had the highest personal confidence in him, and in his exertions to foster the harmony between the two countries. I reported immediately to the President the substance of this conversation, and he concurred in the propriety of the Baron's final determination.

Mr. Carter. At the close of page 277 these extracts that I have read are embraced in a letter of Mr. Blaine, and after giving them, he says this :

As Baron Tuyl surrendered his opinions to the superior judgment of Mr. Adams, the ratifications of the treaty were exchanged on the 11th day of January, and on the following day the treaty was formally proclaimed. A fortnight later, on January 25, 1825, Baron Tuyl, following the instructions of his Government, filed his note in the Department of State.

Sir Charles Russell. Is there any evidence of that?

Mr. Carter. Yes, we have it; that is a copy of the Note as it stands on the files of the Department. Now that is a pretty important transaction bearing upon the interpretation of the Treaty. What is the substance of this transaction? It means that members of the Russian-American Company had an apprehension that it might be maintained that some of their exclusive rights would be thrown open to citizens of the United States, and they remonstrated to their Government. The view which the Russian Government took in regard to that remonstrance appears to have been that the provisions of the treaty did not affect Bering Sea and the exclusive rights which the Company had there, and they instructed their Minister in Washington to make representations to the United States Government. Baron Tuyl states the apprehensions on the part of the Russian Government, and he exhibits a note which asserts as the proper interpretation of the Treaty that the phrase "Pacific Ocean" does not include Bering Sea. What is the reply of Mr. Adams to the Minister of Russia? That that interpretation was ill-founded? Does he contest it at all? No; nothing of the sort. He says that the question of the interpretation of that Treaty must, according to American law, be determined by another Department of the Government — the Judicial Department, for that is a judicial question. He does not state what his own interpretation is, for, if he did, it would have to go before the Senate, and it might raise embarrassing questions there. He says in substance "the point is of no practical consequence, for our people will never go there; there is no danger of that; and if you say anything about it, the effect would be to put fancies into their heads which otherwise they would not entertain. The best thing is to say nothing about it, and let this Treaty be ratified as it stands. If, after that, your Government insists upon doing anything further, let them do it. But my answer to that note, if you lodge it with me, must be that it raises a question as to the interpretation of the Treaty — a question which must be settled by the judicial Department of the American Government." Now I cannot help thinking that Mr. Adams and the American Government would be open to the charge of bad faith if they had made such an answer as that, and should afterwards assert any different interpretation of the Treaty than that which Baron Tuyl suggested. I do not think that we could relieve Mr. Adams or the American Government from the

imputation of bad faith if they then believed that the Treaty bore a different construction than that and did not frankly say so to Baron Tuyll. Baron Tuyll took the advice and acted upon it. He said : "I will not file this note until the Treaty is ratified, and even then I will not unless my Government tell me to do so." He waited, and his Government directed him to file his note, and he did — he filed a note which explicitly stated his interpretation. That note was never answered. Now, if the American Government was ever at any time to dispute the interpretation thus put upon the Treaty, then was the time for them to do it, and if they did not do it then, they would be preclude afterwards from doing so. I cannot help thinking, therefore, that this transaction, subsequent to the actual conclusion of the Treaty, is conclusive as to the interpretation of the Treaty suggested by the Russian Government and now insisted upon by the United States.

The President. Don't you think the silence of Mr. Adams was rather significant? Was it not rather unusual not to answer a written communication?

Mr. Carter. It was significant in the way I have stated. It said to Baron Tuyll : "It is not the province of the Executive part of the Government of which I am a representative to put a construction upon this Treaty. If I should give you a construction, it would not be binding; for at some other time it might become a question, and the Supreme Court of the United States would be alone competent to decide it." But he goes on to encourage him to take no step to settle the point; and that, I must confess, would be astonishing on the part of Mr. Adams, if he thought that at any time the American Government would set up a different interpretation.

The President. Did not the silence of Mr. Adams leave it upon technical grounds?

Mr. Carter. Yes. But it is a question of candor among the representatives of two great nations approaching each other in that way.

Mr. Adams did not put himself upon this ground and say : "You must not interpret my language or my silence beyond what it may immediately import." He did not put Baron Tuyll upon his guard at all. That attitude was not consistent with good faith on the part of Mr. Adams, if he did not feel satisfied, and thought that a different interpretation would at any time be set up.

So much for the American Treaty. But that does not interpret the British Treaty, and it is to that that the attention of the Tribunal is more immediately directed. The language of this latter, although not precisely, is substantially the same; and in the first Article of that Treaty, found on page 39 of the first volume of the American Appendix —

Mr. Justice Harlan. The word "Grand" should appear before "Ocean."

Mr. Carter. I have no other evidence of what the text should be than the American original; it is as it is here, for aught I now.

Mr. Justice Harlan. There was a Treaty in English?

Mr. Carter. Yes. (quoting):

It is agreed that, in any part of the Great Ocean, commonly called the Pacific Ocean, or South Sea, the respective citizens or subjects of the high contracting Powers shall be neither disturbed nor restrained, either in navigation or in fishing, or in the power of resorting to the coasts, upon points which may not already have been occupied, for the purpose of trading with the natives, saving always the restrictions and conditions determined by the following articles.

Whether the word "Grand" belongs there before the word "Ocean" or not, is of no consequence; I assume that the same thing was intended by the Articles in each Treaty. That was the Treaty negotiated between Great Britain and Russia. Now, applying the same method of interpretation which I have to that of the United States, let me say that we know, of course, the views with which the Russian Government entered into the negotiation of this Treaty with Great Britain, for they were substantially simultaneous with the negotiations with the United States; and of course the Russian Government must have approached the negotiations as it approached those with the Government of the United States. In reference to the views of Great Britain, it does not follow that she had the same purposes as animated the United States Government. Her purposes may have been widely different from those of the United States negotiators, or those of the United States Government; but we have this fact, that the negotiations were carried on conjointly, and, presumably, the views of the two Governments were substantially alike. But, so far as the instructions of Great Britain to her negotiators are concerned, I must freely and fully admit that, instead of being mainly confined, as in the case of the United States, to the question of the disputed territory on the North-West Coast, they placed special importance on the maritime pretension of one hundred miles over the sea. The negotiators representing Great Britain were instructed that that was a point which they must specially and, primarily, attend to, and that it was of more consequence than the disputed question of territory on the North-West Coast. In that respect there was a difference. But how was this point arranged? Mr. George Canning instructs Mr. Stratford Canning at St. Petersburg how to proceed on that point. At page 260 of the first volume of the American Appendix is found a letter of instructions from Mr. George Canning to Mr. Stratford

Canning at the Court of St. Petersburg, in reference to the manner in which he was to conduct the negotiations (quoting) :

The correspondence which has already passed upon this subject has been submitted to your perusal. And I inclose you a copy.

1. Of the "projet" which Sir Charles Bagot was authorized to conclude and sign some months ago, and which we had every reason to expect would have been entirely satisfactory to the Russian Government.

2. Of a "contre-projet" drawn up by the Russian plenipotentiaries, and presented to Sir Charles Bagot at their last meeting before Sir Charles Bagot's departure from St. Petersburg.

3. Of a dispatch from Count Nesselrode, accompanying the transmission of the "contre-projet" to Count Lieven.

Now further on it is said :

The whole negotiation grows out of the ukase of 1821.

So entirely and absolutely true is this proposition, that the settlement of the limits of the respective possessions of Great Britain and Russia on the north-west coast of America was proposed by us only as a mode of facilitating the adjustment of the difference arising from the ukase, by enabling the court of Russia, under cover of the more comprehensive arrangements, to withdraw, with less appearance of concession, the offensive pretensions of that edict.

It is comparatively indifferent to us whether we hasten or postpone all questions respecting the limits of territorial possession on the continent of America, but the pretensions of the Russian ukase of 1821 to exclusive dominion over the Pacific could not continue longer unrepealed without compelling us to take some measure of public and effectual remonstrance against it.

You will therefore take care, in the first instance, to repress any attempt to give this change to the character of the negotiation, and will declare without reserve that the point to which alone the solicitude of the British Government and the jealousy of the British nation may attach any great importance is the doing away (in a manner as little disagreeable to Russia as possible), of the affect of the ukase of 1821.

That sets forth what the particular character of their complaint against the Ukase was. He then speaks of the mode in which the negotiation should be conducted. And, finally, he says — and I read now from page 261 :

The right of the subjects of His Majesty to navigate freely in the Pacific can not be held as matter of indulgence from any power. Having once been publicly questioned, it must be publicly acknowledged.

We do not desire that any distinct reference should be made to the ukase of 1821, but we do feel it necessary that the statement of our right should be clear and positive, and that it should stand forth in the convention in the place which properly belongs to it as a plain and substantive stipulation, and not be brought in as an incidental consequence of other arrangements to which we attach comparatively little importance.

This stipulation stands in the front of the convention concluded between Russia and the United States of America, and we see no reason why, upon similar claims, we should not obtain exactly the like satisfaction.

For reasons of the same nature we can not consent that the liberty of navigation through Bering's Straits should be stated in the treaty as a boon from Russia.

The tendency of such a statement would be to give countenance to those claims of exclusive jurisdiction against which we, on our own behalf and on that of the whole civilized world, protest.

No specification of this sort is found in the convention with the United States of America; and yet it can not be doubted that the Americans consider themselves as secured in the right of navigating Behring Straits and the sea beyond them.

It can not be expected that England should receive as a boon that which the United States hold as a right so unquestionable as not to be worth recording.

Perhaps the simplest course, after all, will be to substitute, for all that part of the "Projet" and "Contre-Projet" which relates to maritime rights, and to navigation, the first two articles of the convention already concluded by the court of St. Petersburg with the United States of America, in the order in which they stand in that convention.

Russia can not mean to give to the United States of America what she withholds from us, nor to withhold from us anything that she has consented to give to the United States.

The uniformity of stipulation *in pari materia* gives clearness and force to both arrangements, and will establish that footing of equality between the several contracting parties which it is most desirable should exist between three powers whose interests come so nearly in contact with each other in a part of the globe in which no other power is concerned.

This, therefore, is what I am to instruct you to propose at once to the Russian minister as cutting short an otherwise inconvenient discussion.

There is his instruction to the representative of the government of Great Britain in St. Petersburg.

Mr. Justice Harlan. Let me interrupt you just a moment. I call your attention to the apparent omission in the English translation of the treaty between Russia and Great Britain. The English translation in the British case accords with the American translation.

Mr. Carter. Very likely it may; I do not know.

Lord Hannen. The word "great" is omitted.

Sir Charles Russell. Yes, the word "great" is omitted, too.

Mr. Justice Harlan. I do not know whether there was an omission, or whether there were two treaties, one signed in English and one signed in French, or whether one was a translation of the other. If there was an error in the translation, both sides have committed the error as to the second article, because the word "great" is left out there.

Mr. Carter. There is one in Russian, too.

Mr. Phelps. There were duplicate drafts, one in French and one in English.

Sir Charles Russell. There was one in English and one in French.

Mr. Foster. They were both originals.

Mr. Carter. Is there anything more that the learned Arbitrator wished to ask?

Mr. Justice Harlan. No.

Mr. Carter. I resume, then. The British Minister of Foreign Affairs instructs the British Ambassador in St. Petersburg, who is negotiating the treaty, to carry out the object which Great Britain has in view, of displacing the assumption of Russian dominion in Bering Sea; but to carry it out, if he can, by adopting the first two articles of the American treaty, thus avoiding any discussion with the Government of Russia in respect to its pretension in the Ukase of 1821. That was done; and there appears to have been no further discussion in reference to it. Now, what is the consequence of that as a matter of interpretation? The British Government says, in substance: "Whatever our intentions are upon this point, we are satisfied to take the agreement which you have made with the United States as a settlement. Whatever that agreement is, we are satisfied to take it for ourselves. We have seen it, we are satisfied with it, and we are satisfied to take it for ourselves". In thus accepting the provisions of the American treaty, I respectfully submit to this Tribunal that they must accept the interpretation of the American treaty with Russia, as it was understood by both powers, and what that interpretation was, I think I have already shown to this body.

The President. Do you not think Mr. Canning understood it otherwise than you have explained it to us; for Mr. Canning says that when right of free navigation has been questioned, it must be asserted? I do not remember the words exactly. He says that, though.

Mr. Carter. Yes; very explicitly.

The President. He says: "If you give us the text which may be given to the United States, we will be satisfied"; and, he seems to imply, that the right of British ships to navigate freely in the Bering Sea and across the Bering Straits is granted in the text of the American treaty.

Mr. Carter. So he thought, undoubtedly.

The President. I think he thought so.

Mr. Carter. He thought so, and he told the British Minister in St. Petersburg so; but he did not tell the Russian Government that.

The President. He made a mistake, in your opinion.

Mr. Carter. I do not say he made a mistake. He made a mistake in one thing. He may not have gained what he had prominently in view.

The President. He did not understand the American treaty, or did not construe it as you construe it?

Mr. Carter. He did not construe it as I construe it. I say he made a a mistake so far as supposing that the American treaty would gain the special object which he had in view. If he had supposed that the American treaty was subject to the interpretation which the American and Russian Governments put upon it, it would not answer his purpose; but not having communicated that to the Russian Government, and a settlement having been proposed with the Russian Government by adopting the first two articles of the American treaty, without making any interpretation of them, adopting them as they stood, I submit that in adopting that agreement between the United States and Russia, the interpretation of the United States and Russia was adopted with it; and if I have succeeded in showing that according to the interpretation of the United States and Russia the Pacific Ocean or South Sea did not include the Bering Sea under the American Treaty, it no more included it in the British treaty.

Lord Hannen. Would you say that, Mr. Carter, if the correspondence between the English Government and the Russian Government showed a different interpretation had been put upon the words " Pacific Ocean " ?

Mr. Carter. I beg your Lordship's pardon.

Lord Hannen. I say, would you say that the English Government was bound by the interpretation which you say had been put upon it by the Russian and the American Governments, if the correspondence between the English Government and the Russian Government showed that they understood the words " Pacific Ocean " in a different sense?

Mr. Carter. No, my Lord, I would not.

Lord Hannen. You would not in that event?

Mr. Carter. No; I would not. If there were evidence here tending to show that the Russian Government and the Government of Great Britain in the course of that negotiation put an interpretation upon these very terms different from what Russia and the United States had put upon them, then I should say that they must be interpreted according to the significance in which they were understood by the Governments of Great Britain and Russia; but I have not myself discovered any evidence here tending to show that the terms of this Treaty were understood by the Russian Government and the Government of Great Britain differently from what they were understood by the Government of the United States and the Government of Russia.

Something has been said here to the effect that the language of this treaty as contained in the French original and in the English original is different. It may be so. What I mean is that nothing can be claimed as between those documents. One cannot be

claimed to have any superiority over the other. The Treaty was drawn up in both languages, and signed in both languages; and if the American is to be regarded as a translation of the French, it is a translation which is incontestible as between the parties, as being a correct one, because it bears the signatures of both; and speaking on the subject of translation, it brings to my mind —

Sir Charles Russell. I do not think there is any material difference between them.

Mr. Carter. Perhaps not. Speaking upon the subject of translations, it brings to my mind a matter which heretofore has not been made the subject of discussion at all; and that is the erroneous translations of Russian documents which were originally incorporated into the American Case. The learned Arbitrators have observed that I have in no part of my argument made the slightest reference to them, or made any use of them whatever. It is for this reason : when we first discovered, to our infinite surprise, that we had been imposed upon in some inexplicable manner by a person whom we had employed to translate these documents, and who had made translations of them, indisputably fraudulent, because there were interpolations contained in them for which there was no corresponding language in the original, the question arose, what are we to do with these papers? They must be corrected in some form. Very fortunately for us — although I know my learned friends would not suppose that we were in any manner chargeable with such fraudulent translations; but I say very fortunately for the United States, they had incorporated into the same book, that is, their original Case, which contained these erroneous translations, photographes of the original Russian documents; and of course we had put it into the power of our adversary to convict us of any misinterpretation or mistranslation which might have been given to those documents. We were scarcely the less mortified on that account; and conceived it to be the best course on the whole to absolutely withdraw the papers from the Case, so that no allusion might be made to them. They never at any time were a source of any very important evidence on our part, nor did they constitute any means of any considerable weight in establishing any portion of our Case. We therefore wholly withdrew them. It is unnecessary to say anything further in regard to them. What motive this individual may have had in thus imposing upon us, it is difficult for me to say. His avowed motive was that he wanted to recommend himself to us by showing that he had found in these Russian documents which were a mystery to everybody else, something very much in our favor. It is unnecessary to comment upon that. That explanation has never been wholly satisfactory

to us; and we have never been able to explain the ground upon which such a fraud as this was attempted.

I have now concluded what I have to say in reference to the interpretation of this treaty; and I submit, upon the views that I have presented, that the interpretation of Mr. Blaine, which limits the meaning of the Pacific Ocean or South Sea, to so much of the Great Pacific Ocean as is south of the Alaskan Peninsula, and of the Aleutian chain of Islands, is the correct one. What part does that play in our present pretensions here? Does it demonstrate our claim completely? Not at all. Suppose we failed in establishing our interpretation, and the Government of Great Britain should succeed in establishing theirs to the satisfaction of this body, would it establish their part of the case? Not at all. It has only a remote connection, but still a not wholly unimportant one. It operates in a manner to confirm by the evidence of long possession and long acquiescence those rights to the seal fishery in the Bering Sea which had been asserted at a very early period, and to substantiate our claim in regard to them; and the use we make of the Russian pretensions and our acquisition of Russian rights in our argument is substantially this :

First. The sealing industry on the Pribilof Islands, having been established prior to 1821, was one of the industries to which Russia by the Ukase in question asserted an exclusive right, and to defend which she claimed the right to exercise authority over a part of the high seas adjoining her shores.

Second. These rights were not abandoned, displaced or modified by the treaties of 1824 or 1825, and not being abandoned or modified by those treaties, are fairly to be regarded as having then, and by those treaties, been assented to by the United States and Great Britain.

Third. The subsequent abstention by Great Britain, the United States, and all other nations, and of the citizens of other nations to disturb Russia or her successor, the United States, in the enjoyment of this sealing industry, down to the year 1883, a period of more than sixty years, is additional and satisfactory evidence of such acquiescence.

Fourth. After an acquiescence of this character for so long a period, it is not competent for Great Britain to deny the existence of the right, or the propriety of the defensive regulations necessary to its preservation.

The Arbitrators will perceive, therefore, that the use which the Government of the United States makes of this begins at the time of the Ukase, proceeds upon the assertion that Russia assumed an exclusive right to this industry at that time : that that right, so far as it related to Bering Sea, and of course to the Pribilof

Islands, was not disturbed or displaced by the treaties of 1824, and 1825 and not being displaced, was, inferentially, and by a very strong implication, acceded to and acquiesced in. Next, that implied acquiescence thus fairly derived from the conduct of these several Governments, is further confirmed by a uniform, long-continued acquiescence of sixty years, down to the year 1883, during which no nation and no people of any nation have ever undertaken to disturb or invade in Bering Sea the exclusive right and proprietorship of Russia in this sealing industry.

Those facts and circumstances, although we do not conceive them to be material or vital in this controversy — that is, they are not so material as to be vital — yet have a material and important bearing.

I wish to explain to the Tribunal what our view is of the bearing of these arguments which I have laid before you upon the answers to the first questions in the Treaty; and I must call to your minds again the distinction which I have heretofore attempted to draw between the exercise by a nation of sovereign jurisdiction over the high seas, a sovereign jurisdiction of a character which makes the high seas over which such jurisdiction is attempted to be extended a part of the territory of the nation, giving the nation an exclusive power of legislation over it — the difference between the assertion of such a right as that, and the assertion of a right to exercise acts of force on the high seas for the purpose of protecting a property, or an industry, of a people; one of them being an assertion of sovereign jurisdiction, the other no assertion of sovereign jurisdiction at all, but simply a right of self-protection and self-defence, which a nation, acting as an individual, always has.

I have stated that there was some confusion in the minds of jurists and text-writers in reference to that definition. The same confusion will be found in the language of this Treaty, which draws up the questions which are submitted to the Tribunal.

I refer the Arbitrators to Article 6 of the Treaty, which is found on page 2 of the original Case.

In deciding the matters submitted to the Arbitrators, it is agreed that the following five points shall be submitted to them, in order that their award shall embrace a distinct decision upon each of said five points, to wit :

1. What exclusive jurisdiction in the sea now known as the Behring's Sea, and what exclusive rights in the seal fisheries therein, did Russia assert and exercise prior and up to the time of the cession of Alaska to the United States?

At first reading, it might be supposed that by the term " exclusive jurisdiction " sovereign jurisdiction was intended, and not a right to defend property or industry by self-defensive measures. That might be thought at first blush to be intended by the language

of that first section; and yet I am inclined to think it was not the intention of it, but that what was in the minds of the authors of that article was a power to defend a property interest by defensive regulations; for you will observe they couple that language of "exclusive jurisdiction" with "exclusive rights in the seal fisheries therein." They say: "What exclusive jurisdiction in the sea now known as the Bering Sea, and what exclusive rights in the seal fisheries therein did Russia assert and exercise prior and up to the time of the cession of Alaska to the United States?"

Those two things, the jurisdiction, and rights in the seal fisheries are blended together, and blended together inseparably. What was really in the minds of the authors of the treaty was the question, What rights in the seal fisheries did Russia possess and what rights to defend them by the exercise of authority over the sea?

The next question is :

2. How far were these claims of jurisdiction as to the seal fisheries recognized and conceded by Great Britain?

There you have a distinct recognition that what is in the minds of the framers of this treaty is nothing but rights in seal fisheries. Those rights in seal fisheries might involve indeed a right to exercise an exceptional authority on the sea. They might involve that, but only as a means of protection. We perceive that by the second section, these claims of jurisdiction are confined to claims of jurisdiction as to seal fisheries. "Jurisdiction" means there *authority, power*. It means rights to exercise power on the high seas in relation to the seal fisheries.

3. Was the body of water now known as the Behring Sea included in the phrase "Pacific Ocean" as used in the treaty of 1825 between Great Britain and Russia, and what rights, if any, in the Behring Sea were held and exclusively exercised by Russia after said Treaty?

That clause does not require any comment.

4. Did not all the rights of Russia as to jurisdiction and as to the seal fisheries in Behring Sea east of the water boundary in the Treaty between the United States and Russia of the 30th of March 1867 pass unimpaired to the United States under that Treaty?

There again rights of Russia as to jurisdiction and as to the seal fisheries are mentioned together. They are coupled together. They are rights of jurisdiction only so far as the protection of the seal fisheries require the exercise of something which they choose to call jurisdiction.

5. Has the United States any right, and if so, what right, of protection or property in the fur-seals frequenting the islands of the United States in Behring Sea, when such seals are found outside the ordinary three-mile limit?

Apparently that puts a question, not of jurisdiction at all, but merely a question of property; but the Arbitrators will observe that it is a question of property "when such seals are found outside of the ordinary three-mile limit;" and of course property out there necessarily supposes some power or authority to protect it there, and therefore includes the question of jurisdiction.

Article 7, following that, says :

If the determination of the foregoing questions as to the exclusive jurisdiction of the United States shall leave the subject in such position that the concurrence of Great Britain is necessary to the establishment of Regulations for the proper protection and preservation of the fur-seal in, or habitually resorting to, the Behring Sea, the Arbitrators shall then determine what concurrent Regulations outside the jurisdictional limits of the respective Governments are necessary, and over what waters such Regulations should extend, and to aid them in that determination the report of a Joint Commission to be appointed by the respective Governments shall be laid before them, with such other evidence as either Government may submit.

I rather think that that article 7 regards all the five questions as properly describable as *questions as to exclusive jurisdiction*, and contemplates them as such.

It will therefore be seen that this confusion between these two subjects has found its way into the draft of this treaty.

Having concluded my argument in relation to the rights of jurisdiction acquired by Russia in Bering Sea, as it is called, I wish to state to the learned Arbitrators how those facts bear upon the answers which are to be given to the first four questions submitted to the Tribunal by the Treaty. In our view these are the answers which should be given to them.

The first question, "What exclusive jurisdiction in the sea now known as Bering Sea" etc., should be answered thus — I am now reading from page 40 of my argument:

First. Russia never at any time prior to the cession of Alaska to the United States claimed any exclusive jurisdiction in the sea now known as Bering Sea, beyond what are commonly termed territorial waters. She did, at all times since the year 1821, assert and enforce an exclusive right in the "seal fisheries" in said sea; and also asserted and enforced the right to protect her industries in said "fisheries" and her exclusive interests in other industries established and maintained by her upon the islands and shores of said sea, as well as her exclusive enjoyment of her trade with her colonial establishments upon said islands and shores, by establishing prohibitive regulations interdicting all foreign vessels, except in certain specified instances, from approaching said islands and shores nearer than 100 miles.

To the second question, how far were these claims of jurisdiction as to the seal fisheries recognized and conceded by Great Britain? we think this should be the answer:

Second. The claims of Russia above mentioned as to the " seal fisheries " in Bering Sea were at all times, from the first assertion thereof by Russia down to the time of the cession to the United States, recognized and acquiesced in by Great Britain.

Third. " The body of water now known as Behring Sea was not included in the phrase ' Pacific Ocean,' as used in the treaty of 1825, between Great Britain and Russia ; " and after that treaty Russia continued to hold and to exercise exclusively a property right in the fur-seals resorting to the Pribilof Islands, and to the fur-sealing and other industries established by her on the shores and islands above mentioned, and to all trade with her colonial establishments on said shores and islands, with the further right of protecting, by the exercise of necessary and reasonable force over Bering Sea, the said seals, industries, and colonial trade from any invasion by citizens of other nations tending to the destruction or injury thereof.

This is the answer we propose to the fourth question :

Fourth. " All the rights of Russia as to jurisdiction and as to the seal fisheries in Behring Sea east of the water boundary in the treaty between the United States and Russia, of the 30th of March. 1867 " did " pass unimpaired to the United States under that treaty. "

The Fifth question, which is, " Has the United States any right and if so what right of protection or property in the fur-seals frequenting the islands of the United States outside the ordinary three-mile limit ? " I have regarded as one embracing more particularly the discussion of the question of property, to which I now proceed.

I am glad to pass from these questions of the interpretation of treaties concluded half a century ago, from questions which involve discussions as to the intentions of governments of which we have no very certain evidence, questions which call into consideration and debate doubtful questions of fact, and recur to rights which rest upon fundamental principles. And I approach with satisfaction a stage of this debate where I have an opportunity for the first time of putting the claims of the United States in this controversy upon a basis which I feel to be impregnable; I mean the basis of a property interest.

The United States assert a property interest connected with these seals in two forms, which, although they approach each other quite closely, and to a very considerable extent depend upon the same evidence and the same considerations, are yet so far distinct and separate as to deserve a separate treatment. Those two assertions of a property interest are these :

First, that the United States have a property interest in the herd of seals which frequents the Pribilof Islands, which has its home and its breeding place there ; and,

Second, that, irrespective of any property interest which they may have in that herd, and even if it were held that they had no

property interest in the herd at all, they do yet have a property interest in the industry which has been established by them on those islands, of caring for and maintaining that herd and selecting from it the annual increase for the purposes of commerce; in other words, in the husbandry which is carried on by the United States on those islands.

We assert those two forms of property interest; but my discussion will be directed in the first place to an endeavor to support the assertion of property in its first form; that is to say, in the herd of seals itself.

Now, questions of property are extremely common in municipal jurisprudence, as we know; but they are for the most part such as relate to the transfer and devolution of property, and do not touch the point whether any particular thing or things are the subject of property at all. In this discussion, what we have to consider chiefly is whether these fur-seals are, while they are on the high seas, the subject of property at all. The assertion on the part of Great Britain I assume to be — indeed, they so inform us in their Case, Counter Case, and Argument — that the fur-seals are wild animals — animals *feræ naturæ* — and that they are therefore not the subject of property at all; that they are *res communes*, as the civilians style them, or, as they are sometimes styled, *res nullius* — things common to all men, or things which belong to no one man in particular. Their contention is that while on the high seas, at least, being wild animals, they are not the subjects of property at all.

The United States take the contrary position, and assert that such are the nature and habits of these animals, and such is the relation which they have to these animals on the breeding places, that they are at all times, not only while they are upon the Pribilof Islands, but also while upon the seas, the property of the United States, and property which they are entitled to defend and protect, just as much as they would one of their ships when navigating the seas.

My learned friend, Sir Charles Russell, made an observation when he was speaking upon one of the motions which has been argued, to the effect, as I understood him, that property could not be established outside of municipal law, or that anything, in order to be held as property, must have its characteristics as property rooted in municipal law. I do not know that I am correctly stating his observation; but it is as near as I remember. Well, that appears to be an intimation that we are obliged, in order to determine whether the seals are the subject of property, to recur to municipal law. But it seems to me that if we were limited to municipal law in our inquiries, we might find the greatest difficulty.

The municipal law of what country? If we speak of municipal law, we must go to the municipal law of some particular country. Will you settle it according to the municipal law of the United States? That would be a short settlement of it; for in every form and manner in which a nation can declare its policy by the adoption of municipal laws, the United States have declared seals to be property. My learned friend, I apprehend, would not agree that the question of property in seals should be determined by municipal law, if we are to determine it by the municipal law of the United States; and I do not know of any law of Great Britain which is to the effect that seals are not property. According to my view, the law by which this question, as any question which arises between nations, is to be determined is not municipal law, but international law. To be sure, any question in reference to property which has a *situs* in any particular country, like land, must be determined by the municipal law of the country where it is situated.

That is undoubtedly true, if it has a *situs*; but I suppose that my learned friends would not agree with me that seals have a *situs* in the territory of the United States at all times. If they have no admitted *situs* in the United States, the question as to whether they have a *situs* there cannot be determined by any appeal to municipal law alone, but must be determined by an appeal to international law.

In all this I do not mean that municipal law in relation to property is of no importance in this discussion. On the contrary, it is of the very highest importance that we should seek it, and know just what it is; and it is of consequence in this discussion because it is evidence of what the law of nature is. Property never was created by municipal law at all; that is to say, by positive legislative enactment. Societies have not come together and created property. Property is a creation anterior to human society. Human society was created in order to defend it and support it. It is one of its main objects. One of the main objects for which human society was created was the defence of the institution of property.

It rests upon the law of nature; and the whole jurisprudence respecting property as it stands in the municipal law of the civilized states of the world is a body of unwritten law for the most part. It is derived from the law of nature. Even in those nations where the civil law is crystalized into the form of codes, there are no laws, no enactments, which declare what shall and what shall not be the subjects of property. At least, I apprehend so. Property is assumed as already existing. It stands upon the law of nature. The questions, however, what shall be property and what shall not be

property, and what shall be the rules respecting the protection which is given to it — all these questions have been discussed for a thousand years and more, in municipal law, by learned tribunals, in thousands of different shapes and forms; and consequently the whole law of nature, so far as it affects the subject of property, will be found to be developed in a high degree in municipal law. Therefore, and to that extent, I concur with my learned friend, that it is highly important to investigate the municipal law upon the subject of property; and wherever it is found universally concurring upon a given point, it may be taken as the absolute voice of the law of nature, and therefore of international law.

[The Tribunal thereupon adjourned until Tuesday, April, 19, 1893, at 11.30 o'clock a. m.]

ELEVENTH DAY. APRIL 19TH, 1893.

The Tribunal convened pursuant to adjournment.

The President. If you please, Mr. Carter, you may continue your argument.

Mr. Carter. Mr President, the point upon which I am now engaged relates to that branch of our argument which deals with the question of the alleged property interest of the United States in the fur seals of Alaska. I had briefly spoken yesterday to the effect that the rival contentions of the two Governments upon this subject are to be determined by international law; but in determining what international law was, great advantage would be found in an inquiry into what has been decided by municipal law and by the municipal law of various nations so far as that law shall be found to be consentaneous upon this point.

The rival contentions of the two parties I should perhaps briefly repeat. That of Great Britain is that the fur-seals of Alaska are *res communes*, not the subjects of property, but open to the appropriation of all mankind; and that, too, because they are wild animals. The position taken on the part of Great Britain is in substance that no wild animals are the subjects of property, and that seals, being wild, are not the subjects of property. The United States on the other hand, insist that whether an animal is the subject of property or not depends upon its nature and habits; that the two terms "wild" and "tame" are descriptive of nature and habits to a certain extent; but, in order to determine whether any particular animal, whether wild or tame, is the subject of property, we must go into a closer inquiry into its nature and habits; and if it be found that an animal, although commonly designated as wild, has such nature and such habits as enable man to deal with it substantially as he deals with domestic animals, to establish a species of husbandry in respect to it, then, in respect to the question of property, the same determination must be made as in the case of domestic animals, and the animal must be declared to be the subject of property. The point, therefore, upon which we first insist is that in considering whether an animal, whether he is designated as "wild" or "tame" is the subject of property or not

we must institute a careful inquiry into its nature and habits and the results of that inquiry will determine the question. In this particular I think I am supported by the best authorities. Chancellor Kent, whose authority I am glad to say is recognized by my learned friends on the other side, for they refer to this very passage which I am about to read to the Tribunal, says (Page 43 of our Argument) :

Animals *feræ naturæ*, so long as they are reclaimed by the art and power of man, are also the subject of a qualified property; but when they are abandoned, or escape, and return to their natural liberty and ferocity, without the *animus revertendi*, the property in them ceases. While this qualified property continues, it is as much under the protection of law any other property, and every invasion of it is redressed in the same manner. The difficulty of ascertaining with precision the application of the law arises from the *want of some certain determinate standard or rule* by which to determine when an animal is *feræ, vel domitæ naturæ*. If an animal belongs to the class of tame animals, as, for instance, to the class of horses, sheep, or cattle, he is then a subject clearly of absolute property; but if he belongs to the class of animals, which are wild by nature, and owe all their temporary docility to the discipline of man, such as deer, fish, and several kinds of fowl, then the animal is a subject of qualified property, and which continues so long only as the tameness and dominion remain. It is a theory of some naturalists that all animals were originally wild, and that such as are domestic owe all their docility and all their degeneracy to the hand of man. This seems to have been the opinion of Count Buffon, and he says that the dog, the sheep, and the camel have degenerated from the strength, spirit, and beauty of their natural state, and that one principal cause of their degeneracy was the pernicious influence of human power. Grotius, on the other hand, says that savage animals owe all their untamed ferocity not to their own natures, but to the violence of man; but the common law has wisely avoided all perplexing questions and refinements of this kind, and has adopted the test laid down by Puffendorf, by referring the question whether the animal be wild or tame to *our knowledge of his habits* derived from fact and experience.

In addition to that I will refer the Tribunal to two other authorities; and those are decisions of British tribunals. The first is the case of *Davies vs. Powell*, reported in Willes Reports, page 46. I refer to it on page 44 of my argument.

In that case the question was whether deer caught in an enclosure and having certain characteristics and being used for certain purposes were distrainable for rent. I may say to those not familiar with the special doctrines of the common law of England that there was a process by which a landlord might recover his rent by going upon the premises of his tenant and taking property on the premises; but it was confined to personal property. So the question whether deer were distrainable for rent or not involved the question whether they were personal property in that particular instance. The court in that case took notice of the proofs which were offered in respect to the nature of those particular deer,

their habits and the purposes for which they were kept; and, finding that they were kept, not for pleasure but for profit, that they were carefully preserved, and reared for the beneficial purpose of taking venison from them and furnishing a supply of it to the market, determined that they were personal property and therefore distrainable for rent. The ground was that although deer belong to the class of what is commonly designated "wild" animals, nevertheless when they are taken and kept by man for the purposes for which it was proved in that case they were kept, when they were treated by man in the way in which they were proved to have been treated in that case, although wild animals, they are used for the same intents and purposes as domestic animals are used and should be classed as personal property just as domestic animals are so classed.

Substantially the same decision was made in reference to the same animal in the case of *Morgan vs. the Earl of Abergavenny*, which is reported in the 8th Common Bench Reports. There the question was, upon the death of the owner of a park, whether deer contained in the park went to the heir of the owner or to his executor; in other words, it was substantially the same question whether they were attached to the soil and formed a part of the realty, and therefore were not distinctly personal property, or whether they went to the executor, as being distinctly personal property. In that case a great deal of evidence was gone into upon the trial for the purpose of showing how those particular deer were kept, treated and used in that park. The whole question of property in live animals was very much gone into and discussed. It was shown by evidence that there was a large number of deer there; that they were cared for; that at times they were fed; that they were in the habit of resorting to particular places in the park; and that from time to time selections were made from the number for slaughter and the victims were sold in the market for venison. All that was proved. There was a verdict in that case for the plaintiff which was based upon the charge of the judge to the jury that they might take this evidence into consideration in determining the question whether the deer were property or not; and that verdict for the plaintiff established that they were the property of the executor; that they went to the executor instead of to the heir, and were therefore personal property. On a review by the whole court of that verdict it was decided that this evidence was all proper and relevant to the question; that it was all appropriate, and relevant to the point whether the animals were property or not; and that it did satisfactorily determine, or was a sufficient ground upon which the jury might find, that the animals were personal property.

These authorities to which I have thus alluded are quite sufficient to establish the only point for which I at present cite them, namely, that in order to determine whether an animal commonly designated as "wild" is the subject of property or not we must institute an inquiry into the nature and habits of the animal — that the general terms "wild" and "tame" are not sufficiently significant, for the purpose — that a close inquiry into its nature and habits with the view of seeing whether such nature and habits and the uses to which the animal is put are the same that are characteristic of domestic animals. If so, they are property the same as domestic animals are.

Now, then, what is the case with the fur-seal? So far as respects municipal law — for I am now examining the question wholly as it is affected by the doctrines of municipal law — it must be admitted that the case of the fur-seal is a new one in the law. It has nowhere been specifically decided; but cases as to whether animals more or less resembling the seal may or may not be the subject of property have arisen and been decided in municipal law. There have been a great many cases decided in respect to animals as to which it was doubtful whether they belong to the category of wild or tame — that is if you treat the terms "wild" and "tame" as a juridical classification — or whether their nature and habits were such as to make them properly the subjects of property. Take the case of wild bees, for instance. There is an animal which lies quite near the boundary line which separates wild from tame animals; and the inquiry was made at an early period in municipal law — a period so early that tradition does not inform us of the first instance when the case arose — whether that animal was the subject of property or not. The same question has arisen in reference to wild geese, and swans. Those animals belong to the classes commonly designated as "wild"; but they lie near the boundary. They may sometimes be reclaimed, as it is called. The question has arisen and been determined whether, when reclaimed, they are, notwithstanding the wildness of their nature, the subject of property. The same question has also arisen in reference to deer and pigeons and other animals.

Now, therefore, we are to examine those instances in which the municipal law has dealt with the cases of animals commonly designated as "wild", but which still have, in their nature and habits, some characteristics which assimilate them to tame ones, and see what conclusions municipal law arrives at. In general these conclusions are all exceedingly well stated by the most familiar of authorities in the English law and one of the most elegant and precise, I mean Blackstone. I refer to his treatment of the question. I read from what is quoted from him on page 45 of my argument :

II. Other animals that are not of a tame and domestic nature are either not the objects of property at all or else fall under our other division, namely, that of *qualified, limited, or special* property, which is such as is not in its nature permanent, but may sometimes subsist and at other times not subsist. In discussing which subject, I shall, in the first place, show how this species of property may subsist in such animals as are *feræ naturæ*, or of a wild nature, and then how it may subsist in any other things when under particular circumstances.

First, then, a man may be invested with a qualified, but not an absolute property in all creatures that are *feræ naturæ*, either *per industriam, propter impotentiam, or propter privilegium*.

1. A qualified property may subsist in animals *feræ naturæ, per industriam hominis*, by a man's *reclaiming* and making them tame by art, industry, and education, or by so confining them within his own immediate power that they can not escape and use their natural liberty. And under this head some writers have ranked all the former species of animals we have mentioned, apprehending none to be originally and naturally tame, but only made so by art and custom, as horses, swine, and other cattle, which, if originally left to themselves, would have chosen to rove up and down, seeking their food at large, and are only made domestic by use and familiarity, and are, therefore, say they, called *mansueta, quasi manui assueta*. But however well this notion may be founded, abstractly considered, our law apprehends the most obvious distinction to be between such animals as we generally see tame, and are therefore seldom, if ever, found wandering at large, which it calls *dominatæ naturæ*, and such creatures as are usually found at liberty, which are therefore supposed to be more emphatically *feræ naturæ*, though it may happen that the latter shall be sometimes tamed and confined by the art and industry of man—such as are deer in a park, hares or rabbits in an inclosed warren, doves in a dove house, pheasants or partridges in a mew, hawks that are fed and commanded by their owner, and fish in a private pond or in trunks. These are no longer the property of a man than while they continue in his keeping or actual possession; but if at any time they regain their natural liberty his property instantly ceases, unless they have *animum revertendi*, which is only to be known by their usual custom of returning. A maxim which is borrowed from the civil law, "*revertendi animum videntur desinere habere tunc, cum revertendi consuetudinem deseruerint*." The law, therefore, extends this possession further than the mere manual occupation; for my tame hawk, that is pursuing his quarry in my presence, though he is at liberty to go where he pleases, is nevertheless my property, for he hath *animum revertendi*. So are my pigeons that are flying at a distance from their home (especially of the carrier kind), and likewise the deer that is chased out of my park or forest, and is instantly pursued by the keeper or forester; all which remain still in my possession, and I still preserve my qualified property in them. But if they stray without my knowledge, and do not return in the usual manner, it is then lawful for any stranger to take them. But if a deer, or any wild animal reclaimed, hath a collar or other mark put upon him, and goes and returns at his pleasure, or if a wild swan is taken and marked and turned loose in the river, the owner's property in him still continues, and it is not lawful for anyone else to take him; but otherwise if the deer has been long absent without returning, or the swan leaves the neighborhood. Bees also are *feræ naturæ*; but, when hived and reclaimed, a man may have a qualified property in them, by the law of nature, as well as by the civil law. And to the same purpose, not to say in the same words with the civil law, speaks Bracton; occupation, that is, hiving or including them, gives the property in bees; for, though a swarm lights upon my tree, I have no more property in

them till I have hived them than I have in the birds which make their nests thereon; and, therefore, if another hives them, he shall be their proprietor; but a swarm, which fly from and out of my hive, are mine so long as I can keep them in sight and have power to pursue them, and in these circumstances no one else is entitled to take them. But it hath been also said that with us the only ownership in bees is *ratione soli*, and the charter of the forest, which allows every freeman to be entitled to the honey found within his own woods, affords great countenance to this doctrine, that a qualified property may be had in bees, in consideration of the property of the soil whereon they are found.

In all these creatures, reclaimed from the wildness of their nature, the property is not absolute, but defeasible: a property that may be destroyed if they resume their ancient wildness, and are found at large. For if the pheasants escape from the mew, or the fishes from the trunk, and are seen wandering at large in their proper element, they become *feræ naturæ* again, and are free and open to the first occupant that has ability to seize them. But while they thus continue my qualified or defeasible property, they are as much under the protection of the law as if they were absolutely and indefeasibly mine; and an action will lie against any man that detains them from me or unlawfully destroys them. It is also as much felony by common law to steal such of them as are fit for food as it is to steal tame animals; but not so if they are only kept for pleasure, curiosity, or whim; as dogs, bears, cats, apes, parrots, and singing birds; because their value is not intrinsic, but depending only on the caprice of the owner; though it is such an invasion of property as may amount to a civil injury, and be redressed by a civil action. Yet to steal a reclaimed hawk is felony both by common law and statute; which seems to be a relic of the tyranny of our ancient sportsmen. And, among our elder ancestors, the ancient Britons, another species of reclaimed animals, viz., cats, were looked upon as creatures of intrinsic value; and the killing or stealing one was a grievous crime, and subjected the offender to a fine; especially if it belonged to the King's household, and was the *custos horrei regii*, for which there was a very peculiar forfeiture. And thus much of qualified property in wild animals, reclaimed *per industriam*¹.

The term which describes this species of property—*property per industriam*—indicates the foundation upon which it rests. It is property created by the art and industry and labor of man. It points out that this labor, art, and industry would not be called into activity, and would not produce its useful and beneficial results, unless it had the reward of property in the product of it, and that therefore the law assigns to such animals the benefits and the protection of property for the purpose of encouraging the industry which creates it.

That is the language of Blackstone. It is taken almost bodily from another earlier writer in the law of England—I mean Bracton. And it was by him undoubtedly derived from the civil law in which all or nearly all of these doctrines were established at a very early period indeed. At a very early period in the development of the Roman law, these doctrines were established. I now call the attention of the Tribunal to further extracts from writers

¹. Book II, p. 391.

upon municipal law and I am going to read from page 108 of our Argument, and first from "Studies in the Roman Law" by Lord Makenzie, a well known authority. He says :

All wild animals, whether beasts, birds or fish, fall under this rule, so that even when they are caught by a trespasser on another man's land they belong to the taker, unless they are expressly declared to be forfeited by some penal law, (Inst., 2, 1, 12; Gaius, 2, 66-69; Dig., 41, 1, 3, pr. 55.), Deer in a forest, rabbits in a warren, fish in a pond, or other wild animals in the keeping or possession of the first holder can not be appropriated by another unless they regain their liberty, in which case they are free to be again acquired by occupancy. Tame or domesticated creatures, such as horse, sheep, poultry, and the like, remain the property of their owners, though strayed or not confined. The same rule prevails in regard to such wild animals already appropriated as are in the habit of returning to their owners, such as pigeons, hawks in pursuit of game, or bees swarming while pursued by their owners (Inst., 2, 1, 14, 15).

Then again, a very ancient authority in the Roman law, Gaius, says (Elements of Roman Law) :

SEC. 68. In those wild animals, however, which are habituated to go away and return, as pigeons, and bees, and deer, which habitually visit the forests and return, the rule has been handed down that only the cessation of the instinct of returning is the termination of ownership, and then the property in them is acquired by the next occupant; the instinct of returning is held to be lost when the habit of returning is discontinued.

Another celebrated writer in the civil law, Savigny, says :

With respect to the possession of animals these rules are to be applied thus :

First. Tame animals are possessed like all other movables, i. e., the possession of them ceases when they can not be found. Second. Wild animals are only possessed so long as some special disposition (*custodia*) exists which enables us actually to get them into our power. It is not every *custodia*, therefore, which is sufficient; whoever, for instance, keeps wild animals in a park, or fish in a lake, has undoubtedly done something to secure them, but it does not depend on his mere will, but on a variety of accidents whether he can actually catch them when he wishes, consequently, possession is not here retained; quite otherwise with fish kept in a stew, or animals in a yard, because then they may be caught at any moment (lib. 3, secs. 14, 15, de poss.). Third. Wild beasts, tamed artificially, are likened to domesticated animals so long as they retain the habit of returning to the spot where their possessor keeps them (*donec animum, i. e., consuetudinem, revertendi habent*).

And another very celebrated writer, not upon municipal law, but upon the law of Nature and Nations, Puffendorf, says (lib. 3, cap. I, sec. 3) :

Although a loss seems to refer properly to property, yet by us it will be generally accepted as embracing all injury that relates to the body, fame and modesty of man. So it signifies every injury, corruption, diminution or removal of that which is ours, or interception of that, which in perfect justice we ought to have; whether given by nature or conceded by an antecedent human

act or law; or, finally, the omission or denial of a claim which another may have upon us by actual obligation. To this tends the 13th Declamation of Quintilian, where he plainly shows that one had inflicted a loss who poisoned the flowers of his own garden whereby his neighbor's bees perished, Yet the convincing reason consists in this: Since all agree that bees are a wandering kind of animate life, and because they can in no way be accustomed to take their food from a given place; therefore, whenever there is a right of taking them, there also, it is understood, is laid a general injunction to be observed by all neighbors, to permit bees to wander everywhere without hindrance from anyone.

The passage from Bracton which follows, I will not to read because it is expressed by Blackstone almost in the same terms. The doctrine is stated very intelligently and clearly by Bowyer, a writer upon the Civil Law:

Wild animals, therefore, and birds, and fish, and all animals that are produced in the sea, the heavens, and the earth, become the property, by natural law, of whoever takes possession of them. The reason of this is, that whatever is the property of no man becomes, by natural reason, the property of whoever occupies it.

It is same whether the animals or birds be caught on the premises of the catcher, or on those of another. But if any one enters the land of another to sport or hunt, he may be warned off by the owner of the land. When you have caught any of these animals it remains yours so long as it is under the restraint of your custody. But as soon as it has escaped from your keeping and has restored itself to natural liberty it ceases to be yours, and again becomes the property of whoever occupies it. The animal is understood to recover its natural liberty when it has vanished from your sight, or is before your eyes under such circumstances that pursuit would be difficult.

Here we find the celebrated maxim of Gajus: *Quod nullius est, id ratione naturali occupanti conceditur*. It is founded on the following doctrine: Granting the institution of the rights of property among mankind, those things are each man's property which no other man has a right to take from him. Now, no one has a right to that which is *res nullius*; consequently whoever possesses *rem nullius* possesses that which no one has a right to take from him. It is therefore his property.

I pass on to nearly the middle of page III:

The general principle respecting the acquisition of animals *feræ naturæ* is, that it is absurd to hold anything to be a man's property which is entirely out of his power. But Grotius limits the application of that principle to the acquisition of things, and therefore justly dissents from the doctrine of Gajus given above, that the animal becomes again *res nullius* immediately on recovering its liberty, if it be difficult for the first occupant to retake it. He argues that when a thing has become the property of any one, whether it be afterwards taken from him by the act of man, or whether he lose it from a natural cause, he does not necessarily lose his right to it together with the possession; but that it is reasonable to presume that the proprietor of a wild animal must have renounced his right to it when the animal is gone beyond the hope of recovery and where it could not be identified. He, therefore, argues that the right of ownership to a wild animal may be rendered lasting, notwithstanding its flight, by a mark or other artificial sign by which the creature may be recognized.

Mr. Justice Harlan. The last paragraph in that citation is important.

Mr. Carter. The last paragraph from Bowyer is pertinent. It is on page 112 :

With regard to creatures which have the habit of going and returning, such as pigeons, they remain the property of those to whom they belong so long as they retain the *animus revertendi* or disposition to return. But when they lose that disposition they become the property of whomsoever secures them. And they must be held to have lost the *animus revertendi* as soon as they have lost the habit of returning. Such are the doctrines of the Roman law, which are conformable to the English law, with the qualification of Grotius, which is applicable to the case of all animals *feræ naturæ*, that is to say, that a mark or collar prevents the rights of the proprietor of a wild animal being extinguished by its escape from his sight and pursuit.

I call the attention of the Tribunal to a decision by the Supreme Court of the State of New York, one of the courts enjoying the highest authority in the United States, and especially enjoying the highest authority at the time this decision was made. It is the case of *Amory vs. Flyn* and is reported in the 10th Johnson's Reports 102. It is contained on page 116 of our Argument.

In that case one Amory brought an action of *trover*, as it is called in the English law, against Flyn before a justice of the peace for two geese. That is to say he brought an action for damages for a trespass done to him in taking geese which he alleged to be his property.

This was a case where geese wild by nature had been reclaimed by man to such an extent that they were wonted to a particular spot and yet were in the habit of straying away from it; and having strayed off upon a certain occasion another man took them and handed them over to still another and that other refused to give them up on demand. The question was whether the plaintiff had a property in them.

It appears to have been held in the court below that he had no property; but the Supreme Court reversed this judgment, saying:

The geese ought to have been considered as reclaimed so as to be the subject of property. Their identity was ascertained, they were tame and gentle, and had lost the power or disposition to fly away. They had been frightened and chased by the defendant's son, with the knowledge that they belonged to the plaintiff and the case affords no color for the inference that the geese had regained their natural liberty as wild fowl, and that the property in them had ceased. The defendant did not consider them in that light, for he held them in consequence of the *lien* which he supposed he had acquired by the pledge. This claim was not well founded, for he showed no right in the persons who pawned them for the liquor so to pawn them, and he took them at his peril. Here was clearly an invasion of private right.

I call attention to a later decision by the same Supreme Court of New York which is reported in 15 Wendell's Reports so much as we have printed of it is on page 117 of the Argument. The propositions which are prefixed to the report in the case as being those which are decided by it are these :

The owner of *bees* which have been reclaimed, may bring an action of *trespass* against a person who cuts down a tree into which the bees have entered *on the soil of another*, destroys the bees and takes the honey.

Where bees takes up their abode in a tree, they belong to the *owner of the soil*, if they are *unreclaimed*; but if they have been *reclaimed*, and their owner is able to identify his property, they do not belong to the owner of the soil, but to him who had the former possession, although he can not enter upon the lands of other to retake them without subjecting himself to an action of *trespass*.

The facts of that case appear to be these : One Kilts had brought an action against Goff in a justice's court, an action in the nature of an action of *trespass*, for taking and destroying a swarm of bees and the honey made by them.

The plaintiff in his suit before the justice recovered a judgment and that was affirmed on appeal by the court of Common Pleas of the county where the suit was brought. The defendant then carried the case by what is called a writ of error, to the principal court of the State of New York at that time — not the highest appellate court, but yet a high appellate court. Mr. Justice Nelson, very celebrated in the United States as one of the most distinguished judges, delivered the opinion of the court. He says :

Animals *feræ naturæ*, when reclaimed by the art and power of man, are the subject of a qualified property; if they return to their natural liberty and wildness, without the *animus revertendi*, it ceases. During the existence of the qualified property, it is under the protection of the law the same as any other property, and every invasion of it is redressed in the same manner. *Bees* are *feræ naturæ*, but when hived and reclaimed, a person may have a qualified property in them by the law of nature, as well as the civil law. Occupation, that is hiving or inclosing them, gives property in them. They are now a common species of property, and an article of trade, and the wildness of their nature, by experience and practice, has become essentially subjected to the art and power of man. An unreclaimed swarm, like all other wild animals, belongs to the first occupant — in other words, to the person who first hives them; but if the swarm fly from the hive of another, his qualified property continues so long as he can keep them in sight, and possesses the power to pursue them. Under these circumstances, no one else is entitled to take them. (2 Black. Comm., 393; 2 Kent's Comm., 394.)

A case decided by the Court of Common Bench in Great Britain, and to which I have already referred, that of Morgan and another against the earl of Abergavenny is printed almost *in extenso*, beginning on page 119 of our argument. It is too long to be read; but the whole of it has been printed in order that the Tribunal

may observe the circumstances under which that case arose, and thus ascertain the precise point which was decided. But I will call the attention of the Arbitrators to the paragraph near the bottom of page 125. I have said that in that case, the question being whether deer were property or not, evidence was given tending to show their nature and habits and the purposes to which they were applied. The court says :

In considering whether the evidence warranted the verdict upon the issue, whether the deer were tamed and reclaimed, the observations made by Lord Chief Justice Willes in the case of *Davies v. Powell*, are deserving of attention. The difference in regard to the mode and object of keeping deer in modern times from that which anciently prevailed, as pointed out by Lord Chief Justice Willes, can not be overlooked. It is truly stated that ornament and profit are the sole objects for which deer are now ordinarily kept, whether in ancient legal parks or in modern inclosures so called; the instances being very rare in which deer in such places are kept and used for sport; indeed, their whole management differing very little, if at all, from that of sheep, or of any other animals kept for profit. And, in this case, the evidence before adverted to was that the deer were regularly fed in the winter; the does with young were watched; the fawns taken as soon as dropped, and marked; selections from the herd made from time to time, fattened in places prepared for them, and afterwards sold or consumed, with no difference of circumstance than what attached, as before stated, to animals kept for profit and food.

As to some being wild, and some tame, as it is said, individual animals, no doubt, differed, as individuals in almost every race of animals are found, under any circumstances to differ, in the degree of tameness that belongs to them. Of deer kept in stalls, some would be found tame and gentle, and others quite irreclaimable, in the sense of temper and quietness.

Upon a question whether deer are tamed and reclaimed, each case must depend upon the particular facts of it; and in this case, the court think that the facts were such as were proper to be submitted to the jury; and, as it was a question of fact for the jury, the court can not perceive any sufficient grounds to warrant it in saying that the jury have come to a wrong conclusion upon the evidence, and do not feel authorized to disturb the verdict.

The decision therein referred to with approval was made by lord Chief Justice Willes in the case of *Davies vs. Powell*, a report of which is printed on page 126.

The point in controversy is stated on page 127 :

And the single question that was submitted to the judgment of the court is whether these deer under these circumstances, as they are set forth in the pleadings, were distrainable or not. It was insisted for the plaintiff that they were not;

(1) Because they were *feræ naturæ*, and no one can have absolute property in them.

(2) Because they are not chattels, but are to be considered as hereditaments and incident to the park.

(3) Because, if not hereditaments, they were at least part of the thing demised.

(4) Their last argument was drawn *ab inusitato*, because there is no instance in which deer have been adjudged to be distrainable.

Then the learned judge goes on to say :

First. To support the first objection, and which was principally relied on by the counsel for the plaintiff, they cited Finch 176; Bro. Abr., tit. "Property," pl 20; Keilway, 30 b, Co. Lit. 47 a; 1 Rol. Abr. 666; and several other old books, wherein it is laid down as a rule that deer are not distrainable; and the case of Matlocke v. Eastley, 3 Lev. 227, where it was holden that trespass will not lie for deer, unless it appears that they are tame and reclaimed. They likewise cited 3 Inst. 109, 110, and 1 Hawk. P. C. 94 to prove that it is not felony to take away deer, conies, etc., unless tame and reclaimed.

I do admit that it is generally laid down as a rule in the old books that deer, conies, etc., are *feræ naturæ*, and that they are not distrainable; and a man can only have a property in them *ratione loci*. And therefore in the case of swans, (7 Co. 15, 16, 17, 18) and in several other books there cited it is laid down as a rule that where a man brings an action for chasing and taking away deer, hares, rabbits, etc., he shall not say *suos*, because he has them only for his game and pleasure *ratione privilegii* whilst they are in his park, warren, etc. But there are writs in the register (fol. 102), a book of the greatest authority, and several other places in that book which show that this rule is not always adhered to. The writ in folio 192 is "*quare clausum ipsius A. freget et intravit, & cuniculos suos cepit.*"

The reason given for this opinion in the books why they are not distrainable is that a man can have no valuable property in them. But the rule is plainly too general, for the rule in Co. Lit. is extended to dogs, yet it is clear now that a man may have a valuable property in a dog. Trover has been several times brought for a dog, and great damages have been recovered. Besides the nature of things is now very much altered, and the reason which is given for the rule fails. Deer were formerly kept only in forests or chases, or such parks as were parks either by grant or prescription, and were considered rather as things of pleasure than of profit; but now they are frequently kept in inclosed grounds which are not properly parks, and are kept principally for the sake of profit, and therefore must be considered as other cattle.

On page 129 I read again :

Fourth. The last argument, drawn *ab inusitato*, though generally a very good one, does not hold in the present case. When the nature of things changes, the rules of law must change too. When it was holden that deer were not distrainable, it was because they were kept principally for pleasure and not for profit, and were not sold and turned into money as they are now. But now they are become as much a sort of husbandry as horses, cows, sheep, or any other cattle. Whenever they are so and it is universally known, it would be ridiculous to say that when they are kept merely for profit they are not distrainable as other cattle, though it has been holden that they were not so when they were kept only for pleasure. The rules concerning personal estates, which were laid down when personal estates were but small in proportion to lands, are quite varied both in courts of law and equity, now that personal estates are so much increased and becomes so considerable a part of the property of this kingdom.

From all those authorities drawn from the municipal law of different nations, and confirmed by the ancient Roman law, these propositions are exceedingly clear : That, in respect to wild animals, if by the art, and industry of man they may be made to re-

turn to a particular place to such an extent that the possessor of that place has a power and control over them which enables him to deal with them as if they were domestic animals, they are in the law likened to domestic animals and are made property just as much as if they were domestic animals; and that property continues, not only while they are in the actual custody of the owner of that particular place, but when they are away from his custody, and no matter how far away, so long as they have an intention of returning to it. The property in them ceases only when this intention ceases; and the cessation of that intention is to be inferred, and can only be inferred, from the cessation of the habit of returning. When they have abandoned that habit and have returned to their ancient wildness, they cease to be property and may be taken by any person without an invasion of property right. I may state another proposition fully substantiated by these authorities. It is scarcely another proposition indeed. It is almost the same; but the language is somewhat different, and I may be justified therefore in stating it in a different form: That wherever man is capable of establishing a husbandry in respect to an animal commonly designated as "wild", such a husbandry as is established in reference to domestic animals, so that he can take the increase of the animal and devote it to the public benefit by furnishing it to the markets of the world, in such cases the animal, although commonly designated as wild, is the subject of property and remains the property of that person as long as the animal is in the habit of voluntarily subjecting himself to the custody and control of that person.

Those are doctrines of the municipal law everywhere agreed to. There is no dissent that I am aware of in reference to it; and being the universal doctrines of municipal law they may be taken, I apprehend, in the absence of evidence to the contrary, as being the doctrine of international law.

Sir Charles Russell. You must not assume that I agree to that. You say it is universally admitted.

Mr. Carter. I do not assume that you agree to anything.
[Laughter]

Sir Charles Russell. I should not have interposed but my learned friend said it was universally admitted.

Mr. Carter. I must understand a permanent exception then to that; but I cannot be very well deprived of the use of the word "general" or "universal", because it may be held not to include my learned friend. Let it be understood that I do not mean to include him. So far as my knowledge extends these doctrines are universally acceded to.

The President. Mr. Carter, what would be your legal defini-

tion of the word "husbandry" as you just used it. Would it be merely the fact of gathering the increase of an animal?

Mr. Carter. Yes.

The President. That is enough to constitute husbandry in your view?

Mr. Carter. Taking an animal, caring for it, preserving the stock, and taking the increase for the markets of the community—that is husbandry I suppose; the same sort of husbandry that is exercised in respect to sheep, horses, cattle, or any other of our domestic animals.

The President. I better understand your meaning by your definition, than by your simile or your comparison.

Mr. Carter. Well, it seems to me that the definition is good, and it seems to me that the analogies of the animals to which I allude are appropriate.

There are certain observations which I shall venture to make respecting the law so far as I conceive myself to have established it, so far as I have stated it. I mean, in the first place, that it is uniform in all countries and that it may therefore be taken to be international. Second, that it is not founded upon legislation, but upon the principles of the law of nature declared by the decisions of judicial tribunals as founded upon the law of nature; that that doctrine is made to turn upon the existence of an *animus revertendi*; but that *animus revertendi* must be of itself wholly unimportant. It is indeed a mere fiction anyway. What do we know about the *animus* of one these wild animals? All we know of the intention of the wild animal is that exhibited by his habits; and indeed the law says that the intention is to be inferred only from his habits. As long as the *habit of returning* exists, the intention exists, and when the habit of returning ceases then the intention to return is held to cease. Of what consequence, in itself considered, is this habit of returning, unless it has some social uses and purposes? Why should it be said that a wild animal is the subject of property if he has the habit of returning to the same place, and is not the subject of property if he has not that habit, and ceases to be the subject of property when once he has lost that habit? Why should we say that? There must be some reason for that. Can it be any thing else than this that the existence of the habit enables man to treat the animal in the same way as he treats domestic animals and make the animal subserve the same useful public and social purposes which domestic animals subserve? Plainly that must be the reason for it.

Take the case of wild swans and geese. They are generally held not to be the subject of property. The law, however takes notice of the exception where those animals have been so far re-

claimed that they will continually and habitually resort to a particular place. There the law says they are property; and so long as they have that intention nobody can lay hands on them, wherever they are, whether in that particular place or not. Why does the law say that? Because there is a public utility which may be subserved by that. If you allow the possessor of the place to which they resort to have the right of property in them he will devote himself to the business of reclaiming those animals; and consequently society will be supplied with those animals, whereas otherwise it will not. Property is the price which society must pay for the benefit which is thus gained from those animals. They are the product of the art, and the industry, and the labor which is expended upon them; and being that product, the benefit of it is properly awarded to the person who exhibits that art and industry.

The President. Do you mean to say that the seals reverted to the Pribilof Islands on account of the industry carried on there?

Mr. Carter. Yes.

The President. Perhaps you will come to that later in your argument.

Mr. Carter. I hope my argument will not be anticipated. I shall not fail to complete the analogy. I am now looking to these other instances. Take deer. Why is it that as long as deer are kept for the purposes of sport the law will not regard them as property? Because as long as they are kept for such purposes they subserve no useful social purpose; but the moment a man undertakes to reclaim deer, to take care of them, to feed them, to treat them as he does domestic animals and to supply the markets of society with venison from them, he is awarded the rights of property in them. That is because he is doing a useful public service; because it is a public service that would not be performed unless it was paid for, and because it can be paid for only by the award of the right of property to the one who thus expends his labor.

Take the case of bees. Nothing can be more wild in its nature than a bee. That nature is not in the slightest degree changed when a hive is put inside of a box on the premises of a private individual; and that is all it is necessary to do. But what is the consequence of that? The consequence of that is that a supply of honey may be taken from that animal, and a much greater supply of honey than if you were driven to hunt through the woods to find hives. The consequence is that when that hive swarms, the swarm can be taken and put in another box and thus the number of swarms be multiplied indefinitely and the product of honey indefinitely increased. That is a great service to society. It furnishes it with an article of great utility which otherwise it would not

have, or would not have in anything like the same degree of abundance; and therefore the art and industry, simple though it be, which is expended upon those particular bees, is rewarded by assigning to the possessor of the place where the hives are a right of property in the bees. When a hive swarms he can pursue it away from his own premises upon the premises of another man. It remains his property; and, as appears from the decision which I read to the learned Arbitrators, if they go on to the premises of another person who will not permit the owner of the swarm to go there and take them, they still remain his property; and if they are appropriated by the owner of the land where they take refuge, he is guilty of a trespass.

All of those privileges are awarded to the owner of bees as a reward and encouragement to him for protecting the bees. It is an appeal to the great motive of self-interest so powerful in human nature, and which is the foundation of a great part of all the blessings of society. It is calling into activity a care, industry, labor, and diligence which otherwise would not be exercised.

I might add instances of other animals; but the learned Arbitrators will perceive what the rule is which has been established, the different animals to which it is applied, and the obvious grounds upon which the doctrine is based.

Now let me see whether those doctrines apply to the case of the fur-seal or not. It is only necessary to allude to a few of the characteristics of the seal. In the first place he comes upon the Pribilof Islands voluntarily, and there submits himself absolutely to the control, custody, and disposition of the owner of that place. He is defenceless against man. Still he voluntarily comes there and submits himself to the power of man. In the next place, after migrating from that place he returns to it in obedience to the most imperious of all animal instincts. Nothing can stop him unless he is driven away. Although his absence from that spot is very prolonged and the distances over which he travels very great, that instinct to return is never for a moment absent. It is superior — very far superior — to any instinct that a deer may have to go to a particular place, or the wild awans, or geese, or pigeons, or animals of that sort. Seals will go through all obstacles and all dangers and certainly return to that spot. What is the social utility which this habit offers? Man is enabled by means of it to practice a species of husbandry. He can take the annual increase of that animal without in any respect diminishing its stock. In other words, he can deal with the animal precisely as he does with domestic animals and precisely as if the animal were domestic. Therefore we find here all the elements, all the foundations, upon which as Blackstone calls it, property *per industriam* stands.

You may ask what care, what industry man practices in reference to the seal. He does not take him and teach him to return; he does not laboriously wont him to this particular spot; the animal is inclined to go there anyway. No; he does not; but you will perceive upon a very little reflection the degree of care and industry which is exercised. In the first place the United States, or Russia before the United States, carried thither to these islands several hundred people, and they constituted a guard over those islands and preserved the seals and protected them against all other dangers except that of being slaughtered in the manner which I have described — a very great labor and a great deal of expense. The seals are freely invited to come to those islands. No obstacle is thrown in their way. Their annual return is cherished in every way in which it can be cherished. Very great expense is undergone in extending this sort of protection over them. In the next place, and what is particularly important, the United States, and Russia before the United States, practiced a self-denial, an abstinence, in reference to that animal. They did not club him the moment he landed and apply him to their purposes indiscriminately, male and female. They did not take one in this way. They carefully avoided it. They practiced a self-denial. And that self-denial and the care and industry in other respects which I have mentioned leads those seals to come to those islands year after year, where they thus submit themselves to human power so as to enable the whole benefit of the animal to be applied to the uses of man. Let me ask what would have been the case if this care and industry had not have been applied? Suppose the art and industry of the United States and its self-denial had not been exerted, what would have been the result? We have only to look to the fate of the seal in other quarters of the globe where no such care was exerted, to learn what would have been the result. They would have been exterminated a hundred years ago. That herd would not exist there now, and could not exist. Every marauder who thought he could make a profitable voyage by descending upon the islands in the hope of getting seals would have gone there and killed indiscriminately all that he could find. The herd would have been exterminated just as such herds have been exterminated in every other quarter of the globe where this care has not been exercised.

Therefore, I respectfully submit to you that the present existence of that herd on those islands — the life of every one of those seals, be they a thousand or be they five millions — is the direct product of the care, industry, labor and expense of the United States; and they would not be there except for that care and industry.

What is contended for upon the part of Great Britain here is the right to prey upon a herd of animals which are in every sense the creation of the labor and industry of the United States and which would not exist — would not exist for the world, would not exist, even for those who thus prey upon them, except for the exercise of that care and industry. There is no contradicting that position at all. It is not susceptible of denial, or of doubt. It is absolutely certain that this herd would not exist a day on the Pribilof Islands, nor would it have existed on any day within the last half century, but for the exercise of the care, labor, industry, and self-denial by Russia, and her successor, the United States.

If the exercise of those qualities in the case of the wild swan, of deer, of bees, and of the other animals to which I have alluded are sufficient grounds and reasons why an award of property should be made to those who exhibit the care and industry which cherish and preserve them, why should it not be made in this case? Therefore I say that upon the plain doctrine of the municipal law, the position of the United States, that these seals are the subject of property, and that they belong to the United States, not only while they are on the islands but at all times during their migrations, near or remote, is fully established.

I might properly leave the argument here. The propositions in respect to property which I have shown to be true in reference to other animals, wild in their nature but reclaimed by man, are true in respect to seals. There are indeed differences between seals and the other animals; but the differences are wholly immaterial to the question in dispute. They do not affect it at all. The right of property is awarded in those instances for social reasons and in consequence of great social benefits; and these social reasons and social benefits are as strong — I may say much stronger — in the case of the seals than they are in the case of any other animals to which allusion has been made as being subjects of property after they are reclaimed. It may be said that in the case of the other animals, like wild geese, and swans and deer, that the disposition to return has been created by man. Suppose it was created by man in those instances, and not created by man in the case of the seals. Would that make any difference? No. The public and social benefits which result from an award of property are the same in the one case as in the other. But it is not true, this suggestion that the instinct is created in the case of the other animals. The instinct to return is natural in all the cases alike. Man only acts upon it; and he acts upon it in the one case just as he acts upon it in

another. If there was not a natural instinct to return in the case of wild geese and swans, they could not be made to return. It is their native qualities, their natural instincts, which are acted upon by the art and industry of man and which produce the useful result; and they are acted upon in the case of the seals just as much. Of course it is true that the wanderings of the seals from the place to which they thus resort are much wider and more protracted than in the case of the other animals; but has it ever been suggested in the case of the other animals that the question whether an award of property could be made would depend upon the extent of their wanderings? Not at all. No matter how widely they may stray, no matter how long they may be absent, so long as you can say that the *animus revertendi* remains, so long the property exists and will be protected.

In respect to seals, we may say, with a certainly and absoluteness which cannot be declared with reference to other animals, that the *animus revertendi* does always exist. It may be said — indeed, is said, as I observe, in the argument of my learned friends on the other side — that the seals do not return to the same particular spot. It is said that a seal may go one year to the Island of St. George and in another year he may go to the Island of St. Paul. Of what consequence is that?

Mr. Foster. That is not proved. It is a mere supposition.

Mr. Carter. That may well enough be true, for aught we know. I shall not take pains to undertake to show that it is not true; for it is a circumstance of absolutely no importance. The only important thing about it is that the animal should return to the human owner; that he should return to the custody of the owner who has exhibited the care and diligence which enables him to put that return to advantage. All these islands are the property of one proprietor, and all the benefits which can possibly arise from the return of an animal to a particular place, and a submission of himself to the power of man, can be reaped in the case of the seals.

It is suggested that you are not certain that the seals that come this year are the same seals that were there last year, and it is suggested that there is an intermingling between the two herds on the two sides of the Pacific Ocean; that seals which frequent the Commander Islands, belonging to Russia, are found mingled with the herds which go to the Pribilof Islands. That is all conjecture. There is not an item of evidence tending to show that any such comingling as that occurs in point of fact. It is against the teachings of natural history. It is against

everything which we know in reference to the habits of this particular herd. All parties were agreed, until it became of some importance to suggest some failure of identification, that this particular herd that visits the Pribilof Islands confines itself to the western coast of America. It goes nowhere else. These are its sole places of resort for the purposes of breeding; and it is proved with a certainty which any court of justice would act upon anywhere that any seal found upon the western coast of America belongs to that particular herd and makes those islands his home.

The President. Mr. Carter, would you call the Pribilof Islands the home of those seals. You have explained the *animus revertendi* in such a way as to lead us to suppose that the animal which reverts to its usual haunts, reverts in some measure to its home. Would you say the same for the seals?

Mr. Carter. I call the Pribilof Islands their home. I am not particular about the name which is applied to it. You may call it their place of resort, their breeding ground, or what not. Whatever you choose to call it, the fact is clear that they go there for the purposes of breeding; they stay there five months in the year; they bring forth their young there; and you can go there and easily separate the superfluous males from the rest of the herd, for the purpose of affording them to the commerce of the world. The name is of course unimportant. It is the facts which determine the question.

I have said that these doctrines are clear upon the settled rules of municipal law; and without going into reasons which we do not find plainly apparent upon the doctrines of municipal law.

But I am not disposed to leave the question there; because the argument can be strengthened. I have said nothing about the principles and rules upon which the institution itself of property stands. The institution of property is anterior to municipal law, or anterior, at least, to any considerable degree of development in municipal law. It is assumed to exist by municipal law; and it is only in these comparatively rare instances, exceptional instances, such as swans and bees, pigeons and deer, that the question of the foundation of the institution of property has been inquired into by those who administer the municipal law. There are those instances; but what if we should inquire into the foundations of property generally, and see what the reasons are which support it? Why is it that the institution of property exists at all? Why is it that one man is permitted to own one hundred thousand acres, if you please, of the earth's surface, and another man have not where to lay his head?

Why is it that society permits one man to hold, and defends him in holding, store-houses, magazines of provisions, and another is starving for hunger? Those things cannot be arbitrary. Such institutions cannot be the result of chance, cannot rest upon any arbitrary reasons. They must stand upon great social grounds; and therefore it is very pertinent to inquire what those social grounds are.

I therefore invite this Tribunal to accompany me in a somewhat larger inquiry, very pertinent to the matter which is now before them, — an inquiry as broad as the social interest of all nations, which this Tribunal is supposed to represent.

The President. You want to take us into a discussion of socialist theories or principles?

Mr. Carter. I do not object to discussing socialist theories, provided I reduce them into some brief compass.

The President's question reminds me of an observation of one of his countrymen, called illustrious by his friends, and, I suppose, denounced as notorious by his enemies. It was the Frenchman Prudhon, who said that property is robbery; and he was right. Property is robbery, unless you can defend it on some great social grounds, and support it upon the basis of great social benefits. If you can show that it is necessary to society, necessary to order, necessary to civilization, and necessary to progress, then you can defend it. Otherwise, it is robbery.

What is property? It is sometimes said to be the right to the exclusive enjoyment of a thing; but that rather indicates the jural right which belongs to it and is attached to it, and not the thing itself. What is it? I think it is well expressed by one or two writers to whom I will call attention. It is very hard to define what property is. We can feel it; it is hard to define it.

Savigny says (page 51 of our Argument): "Property according to its true nature, is a widening of individual power". It is, as far as tangible things are concerned, an extension of the individual to some part of the material world, so that it is affected by his personality".

And the philosopher Locke expresses the same idea. He says:

The fruit or venison which nourishes the wild Indian..... must be his, and so his, *i. e.*, a *part of him*, that another can no longer have any right to it, etc. (Civil Government, Ch. V, § 25).

A German writer of great distinction, Ihering, gives substantially the same definition of it:

In making the object my own I stamped it with the mark of my own person; whoever attacks it attacks me; the blow struck it strikes me, for I am present in it. Property is but the periphery of my person extended to things. (Ihering, quoted by George B. Newcomb, Pol. Science Quarterly, vol. 1, p. 604.)

That is a very happy definition of what property really is. It is a part of the person, and whoever touches the property of a person touches him. Whoever touches the property of a nation touches the nation itself.

That is a description of the thing itself. Now, what is the right on which it is founded? In going into this inquiry as to what the right of property is founded upon, I am not going to deal with any abstract question; nor am I going to deal with questions that have not been considered as the province of jurists. On the contrary, I am entering on a question which has been, from the first, considered peculiarly the province of jurists, and especially of jurists dealing with the law of nature and the law of nations. The great writers upon that law, beginning with Grotius, have considered that no ethical system could be complete, and, consequently, that no system of the law of nature and nations could be complete, which did not deal with the institution of property and the foundations upon which it rested. And in what I am going to say, I shall do little more than recall views which have been before stated and developed by very many different writers. Possibly I may carry them a little further in the development; but for the most part I shall only repeat what has been said before.

These writers, in endeavoring to ascertain the foundations of institution of property, take first into consideration its universal prevalence everywhere all over the globe; and in every stage of human history, and then recognize in this the truth that it is and must be founded upon the facts of man's nature, and the circumstances, the environment, in which he is placed. They tell us that man is by nature a social animal, and must live in society, and that society is not possible unless we can have order and peace. Wherever there is anything desirable to men, wherever there is an object of human desire, of which the supply is limited — where there is not enough for all — there will necessarily be struggle and contention for the possession of it; and if there were nothing to prevent it, those who had the most power would engross the most valuable things of the world. There would be constant warfare for the possession of desirable things where there was not enough for all, unless there were some rule and some means by which that warfare should be prevented. Therefore, property at once becomes a necessity, in order that there may exist peace and order in human society.

We may say, therefore, that the foundation of property, its first and original foundation, was in necessity, the necessity of peace and order; and that necessity requires that property be carried to this extent: that every object of desire, the supply of which is limited, must be owned by somebody. When you have that state

of things, you have peace, and until that state of things is established, you cannot have peace. Therefore we find that everywhere where men are formed into human societies, a determinate owner is assigned to every object of human desire, the supply of which is limited. Those views are well expressed in the early part of Blackstone's Commentaries on the Law of England. He has a very elegant chapter, to which I would refer the particular attention of the members of the Tribunal. I shall read here only an extract from it, on page 54, of our Argument. He says :

Again, there are other things in which a permanent property may subsist, not only as to the temporary use, but also the solid substance; and which yet would frequently be found without a proprietor had not the wisdom of the law provided a remedy to obviate this inconvenience. Such are forests and other waste grounds, which were omitted to be appropriated in the general distribution of lands. Such also are wrecks, estrays, and that species of wild animals which the arbitrary constitutions of positive law have distinguished from the rest by the well known appellation of game. With regard to these and some others, as disturbances and quarrels would frequently arise among individuals, contending about the acquisition of this species of property by first occupancy, the law has therefore wisely cut up the root of dissension by vesting the things themselves in the sovereign of the State, or else in his representatives appointed and authorized by him, being usually the lords of manors. And thus the legislature of England has universally promoted the grand ends of civil society, the peace and security of individuals, by steadily pursuing *that wise and orderly maxim of assigning to everything capable of ownership a legal and determinate owner.*

Sir Henry Mayne has also made an allusion to this doctrine, which is well worthy of consideration. He speaks of this rule of assigning a determinate owner to everything capable of ownership, not simply as an original feature in human society, but one which from the long habitudes of society comes to be regarded as essential by every one. He says :

It is only when the rights of property gained a sanction from long practical inviolability, and when the vast majority of objects of enjoyment have been subjected to private ownership, that mere possession is allowed to invest the first possessor with dominion over commodities in which no prior proprietorship has been asserted. The sentiment in which this doctrine originated is absolutely irreconcilable with that infrequency and uncertainty of proprietary rights which distinguish the beginning of civilization. The true basis seems to be not an instinctive bias towards the institution of property, but a presumption, arising out of the long continuance of that institution, that *everything ought to have an owner.* When possession is taken of a "*res nullius*", that is, of an object which is not, or has never been reduced to dominion, the possessor is permitted to become proprietor from a feeling that all valuable things are naturally subjects as an exclusive enjoyment, and that in the given case there is no one to invest with the rights of property except the occupant. The occupant, in short, becomes the owner, because all things are presumed to be somebody's property, and because no one can be pointed out as

having a better right than he to the proprietorship of this particular thing. (Ancient Law, Ch. VIII, p, 249.)

And Lord Chancellor Chelmsford made use of the same doctrine in rendering the decision of the House of Lords in the case, very familiar to my friends on the other side, doubtless, of *Blades v. Higgs*. That was a case where a trespasser entered the grounds of another where he had no right, and killed some game there; and the question was, to whom the game belonged, whether to the trespasser, or to the owner of the property. The judgment of Lord Chancellor Chelmsford proceeded along this line: he says, everything that is capable of ownership must be owned by somebody, and therefore in this case, this dead game must be owned either by the man who killed it, the trespasser, or by the man upon whose ground it was killed. He says it cannot be the property of the trespasser, for a man cannot be permitted to work out for himself an advantage by the commission of a wrong; and it must therefore be the property of the owner of the soil. That was the conclusion of the court—quite contrary to what the rule of the civil law would be in the same case; but I cite it for the purpose of showing that this doctrine upon which I am insisting, that the necessities of society require, and always have required, that everything should have a determinate owner, is one which is every where received, and even so far received as to be made the foundation of judicial decision.

[The Tribunal thereupon took a recess.]

The Tribunal. Upon resuming.

Mr. Carter said: In the inquiry as to the origin of the institution of property, I had reached the conclusion that the original basis of it was the necessity of peace and order, which is of course an absolute requisite of human society. And therefore the institution of property is coeval with the existence of human society upon the earth. That institution stands upon the immutable basis of necessity; and, to employ the language of Blackstone, I may say that "necessity beget property." Necessity requires that everything capable of being property must be assigned to some legal and determinate owner. If that is done peace is secured; if that is not done, there is strife and warfare in society, and society can no longer exist. Now, there are three things necessary in order that property may subsist in anything; first, the thing, in order to be a subject of property, must be an object of human desire; that is to say, it must have a recognized utility. Property cannot exist in noxious animals, such as reptiles, or in weeds. Nothing that is not an object of human desire can be property. Nobody wants

such things, and what nobody wants is not the subject of property. In the second place, the thing must be limited in supply; there must not be enough for all. It must be exhaustible. Therefore, there cannot be any property in the air, in the sunlight, in running water, or things of that sort. They exist to an infinite extent, and there is abundance to satisfy the wants of everyone, and there can be no contention respecting the ownership of such things. Then, thirdly, the thing must be susceptible of exclusive appropriation. Take animals called game, for instance. There is no question as to their utility. There is not enough for all; yet they cannot be made the subjects of exclusive appropriation; no man can take them and hold them; and human law cannot, by stamping them as the property of one man, bring them within the province of property. The three fundamental conditions of property, are, therefore, first, that the subject of it should be useful; second, that it should be limited in supply; and, third, that it should be capable of exclusive appropriation. These are deductions of reasoning from the admitted facts of man's nature, and from the circumstances in which he is placed; but they will be found at once confirmed upon appeal to experience. We cannot now find, we could not find, in any stage of human society, anything embracing these three conditions—utility, exhaustibility, and capacity of exclusive appropriation, which is not regarded as the determinate property of some individual or corporation. Now this is true not only of property as between individuals but also of property as between nations; for the same necessity of peace and order exists in the larger society of nations as in the smaller municipal societies of the world. But the larger society of nations cannot exist in comfort unless there is established the means of putting an end to strife and contention. If there is no rule to settle disputes, nations, would be always at war; and consequently we find that, in respect to such things as are not susceptible of ownership by individuals, if they are objects of desire, if the supply is limited, and if they are capable of exclusive appropriation, they must be owned by some nation. Now that principle in respect to nations finds its apt illustration in the case of newly-discovered countries. When the New World was revealed to the Old, there were vast tracts of the earth's surface which became the object of contending ambitions, and there would have been perpetual war among the different nations had there not been some rule by which international strife could be appeased, a rule which ordained that everything must be owned by somebody. It is there that we find the efficacy of the title of first discovery. The rule was early established that the nation that first discovered any new region should be regarded as having a fixed and perfect title to it. Why should that be? Why should the mere circumstance that the

citizen of one nation had coasted along the shore of a hitherto unknown region give his country as a nation the power of enjoying the benefits of the discovery? Because the nations felt the necessity of some rule which would prevent strife among them; and therefore the least circumstance giving a superior moral right to one over another was recognized, and new territory was awarded to the one who first discovered it.

The President. Where did you find that rule? Did the mere fact of discovery confer a title? That is not the law as it stands now. The Conference which met in Berlin two years ago held that discovery would not create title without occupation.

Mr. Carter. I think that doctrine does not vary from the one I am endeavoring to state. Of course, if a nation has discovered a new region and has abandoned all intention of occupying it, that abandonment is evidenced by the fact that it does not follow up discovery, by occupation. The failure, after a sufficient lapse of time, to occupy the tract would be considered as a relinquishment of the right to occupy.

The President. The practical consequences are the same.

Mr. Carter. Yes. I fully agree to the apparent modification suggested by the learned President. Authority for the contention I have just made will be found frequently stated by the writers on the law of nature and the law of nations. It is very clearly put by Chief Justice Marshall of the Supreme Court of the United States, in the noted case — in America, at least — *Johnson v. Mc Intosh*, which will be found at page 56 of our Argument (quoting) :

As the right of society to prescribe those rules by which property may be acquired and preserved is not, and can not be, drawn into question; as the title to lands, especially, is, and must be admitted, to depend entirely on the law of the nation in which they lie, it will be necessary, in pursuing this inquiry, to examine, not simply those principles of abstract justice which the Creator of all things has impressed on the mind of his creature, man, and which are admitted to regulate in a great degree the rights of civilized nations, whose perfect independence has been acknowledged, but those principles also which our own Government has adopted in the particular case, and given as the rule of decision.

On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent afforded an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy. The potentates of the world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing upon them civilization and Christianity, in exchange for unlimited independence. But, as they were all in pursuit of nearly the same object, it was necessary in order to avoid conflicting settlements, and consequent war with each other, to establish a principle which all should acknowledge as the law by which the right of acquisition,

which they all asserted, should be regulated as between themselves. This principle was that discovery gave title to the government by whose subjects, or by whose authority it was made, against all other European governments, which title might be consummated by possession. The exclusion of all other Europeans necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives and establishing settlements upon it.

It was a right with which no Europeans could interfere. It was a right which all asserted for themselves, and to the assertion of which by others all assented.

Property, in newly discovered lands is founded, therefore, upon the right of discovery, which gives the title, although a failure to occupy may be evidence of abandonment. There is another circumstance that I may mention as having a tendency to support the line of argument which I am following. It will be remembered that at this period, when the riches of the New World were discovered and there was danger of so much strife, one of the Popes made a grant to Spain of all undiscovered regions of the globe west of the 100th meridian of longitude. Well, we should perhaps not recognize such a title in these days; but it will be remembered that at that time the authority of the Papacy was more highly held than now —

The President. It was more universal.

Mr. Carter. Yes, more universal. And who will say that when the object is to find a rule to prevent war, the acquisition of a title like that would be insignificant? No, it was respected by a great many, and it was not so absolutely unfounded and preposterous as some at the present day may think it; it had a weight and importance at that time which we cannot fully appreciate now. But both of these things go to show that the institution of property was to prevent strife, and they prove that we must find an owner for everything. So much for the first ground and reason upon which the institution of property stands among men. It is complete in itself, because it is the fruit of social necessity.

But so, far as the prevention of strife is concerned, it is not necessary that private, individual, property should exist. The institution of property would be necessary, but there are two forms of the institution of property. One is community property, and the other private individual property; and the single necessity of the prevention of warfare and strife would be satisfied by the institution of community property. And, accordingly, we find that in the earlier periods of society, under rude social conditions, private individual property did not exist, but the community, the tribe, the *gens*, owned all the property, and there was substantially no individual property. Whence, then, have we derived that other form of property called private individual property? It does not proceed upon the ground of the necessity for the prevention of strife and warfare; it comes

from another circumstance to which I will now call the attention of the Tribunal. That circumstance is the necessity of civilization, and it is founded upon the fact that man has a desire to better his condition, to enjoy more and more the good things of life. He has a desire to establish a family and to increase the number of those dependent upon him, and he is ambitious for more and more property, and it is upon those tendencies that the civilization of the earth is founded. It brings along with it several distinguishing features. In the first place, there comes a desire for fixed habitation, instead of a wandering life. Then there follows a great increase in the population of the earth. In the next place there come the division of employments and the exchange of products, which is called commerce; and, lastly, there is the introduction and use of money. All these elements are features of civilization; they make their appearance simultaneously, and gradually, and by degrees, they change the face of the earth; and they are, as I shall submit to you, not the foundation of the institution of property itself, but of that form of it which is called private individual property. And the principal one of these features which constitutes the foundation of private property and makes this necessary is the increase of the population of the earth; and it is to this fact that I wish to ask your attention. Under barbaric conditions men live upon the spontaneous fruits of the earth and upon such animals as they can obtain by hunting. They cultivate nothing; the earth affords them support, but it is a support sufficient for but very few, and they can be only a sparse population under these conditions. But as civilization advances increasing numbers make their appearance upon the earth, and these increasing numbers must be fed. The necessity of feeding them requires the cultivation of the earth and the turning to account all the bounties of nature and making them sufficiently productive to supply the increasing wants of the increasing population. Labor therefore becomes at once necessary. And how are you going to induce men to labor? Society cannot compel them to it; that is not practicable. The way in which they are induced to labor is to promise them the fruits of their labor; it is an appeal to the imperious and everywhere present motive of self-interest. No man will cultivate fields, none will sow, if another be permitted to reap the produce. No man will undertake to tame the animals of the earth and increase their numbers if the increase can be taken from him by anyone who will. Labor cannot be brought into activity, men cannot be induced to exert their natural powers, unless you promise and secure to them the product of their labor; and it is there where the institution of private property begins; it is the necessity of supplying

the wants of the increasing numbers which civilization brings along with it which has established that form of property known as private individual property. It is now that the land comes to be cultivated; and society says to its members: "If you cultivate this land you shall have the product of the fields". Society says again: "Here are the various races of animals. If you will domesticate them, you shall have the increasing numbers for yourself". Society says also, in reference to all articles of manufacture: "If you will make these weapons, those implements, that furniture, they shall be yours". Society everywhere says to its members: "The products of your art and industry and labor shall belong to you". And therefore we have, with the increasing numbers which civilization brings with it, the change of property from community property into private individual property.

Now I have said all I intend to say for the purpose of showing how property, whether in the form of community property or private individual property, has its origin; and I now wish to say something as to the *extent of the dominion over things* which is implied by the term "property". And, first, it is not an absolute dominion. No man and no nation has, under the law of nature, or under the moral law, or in any view consistent with the moral order of the world, an absolute property in anything. It is at all times coupled with what may be called a trust for the benefit of mankind. There is no absolute right in any man to anything on the face of the earth. The earth and all its bounties were originally the gifts of Almighty God to mankind in general; not to this nation, not to that nation, but to all men equally and alike; and that title, that beneficial title, belongs to all men without exception. Nor does it wholly disappear with the establishment of individual property. The custody of the thing is indeed given to individuals, or to particular nations; but it is at all times accompanied with a trust for the benefit of mankind for whom it was originally designed and for whom Nature still designs it. Well now, how is that trust worked out? How shall men all over the earth be enabled to enjoy this beneficial interest which nature originally intended them to have in all the productions of the earth? It is through the instrumentality of commerce, which is another result of civilization. It is by means of the exchange of products between different regions of the earth, and between different peoples, that all are enabled to enjoy this beneficial interest in the things of the earth which was originally designed by Providence. They could not indeed have these products except through the agency of individual property, or national, property and the instrumentality of commerce. Take these seals for instance. They were intended and created for the benefit of mankind — for mankind in Europe, as well as for the people living in the vicinity of

the islands where they have their home. But how were they used before commerce existed? They were turned to account only by the few hundreds or thousands of Indians who lived along that coast, and no other people were benefited, or could be benefited by them, for there were no means of getting them. But when commerce is introduced, the sealskins, through the instrumentality of commerce, make their way all over the world, and eventually come into the possession of the very persons who want them, wherever those persons dwell. In that way the general benefit of all mankind is fully and effectively worked out, although the custody and possession of the thing is given to some particular nation, or to some particular men.

And how perfectly this operates will be seen when we consider that the seals, even to the people capable of gathering them and taking their skins—I mean the tribes of Indians—were of no utility except for supplying their immediate wants; and a few hundreds or a few thousands were sufficient for this purpose. The rest were not utilized, because there were no means by which the benefits to be derived from these animals could be carried to the other parts of the world the inhabitants of which might enjoy them. But when commerce was instituted, then the inhabitant of Europe who wished to possess a sealskin could furnish some of his own products to those who gathered the seals and thereby obtain some of the skins. In other words, the giving of these seals to commerce, or the product of them to commerce, is tantamount to putting them up at an auction, and the man who lives in Europe can thus have them on the same terms as the man in the United States. And therefore there is a supply to all mankind, that is, to all who want them. And this truth will be further illustrated when we inquire who would be the losers if this commerce did not exist. For instance, if the seals were destroyed, who would lose? You may say that the loss would fall upon those who gathered them; but that would be a temporary loss, for the persons so engaged could direct their energies to other forms of industry. So also of the persons engaged in the manufacture of sealskins in Great Britain. A temporary loss might fall upon them; but there are plenty of other kinds of employment, and the loss would be only a temporary one. But when you come to the person who wants the sealskin for his own use, his loss is irreparable and cannot be supplied. Now I have said that the title, whether of nations or of men, to particular things is not absolute, but coupled with a trust for the benefit of mankind. So far as any man or any nation has more of a particular thing than is necessary for his, or its, own purposes, there is an obligation to let others share in the enjoyment of it: the thing is held upon trust. And we shall see that the law of nature perfectly recognizes that trust; for commerce is by the law of nature

obligatory. No nation has a right, without sufficient cause, to withdraw itself from commercial communication with the rest of the world, and say to the other peoples that it will not afford to them a share of its own blessings and benefits. I may read from the authorities collected in a note at page 61 of the Case of the United States. And first a passage from a work on the "Rights and Duties of Neutral Nations in Time of War" by M. Hautefeuille (quoting) :

The Sovereign Master of nature did not confine himself to giving a particular disposition to every man; he also diversified climates and the nature of soils. To each country, to each region, he assigned different fruits and special productions, all or nearly all of which were susceptible of being used by man and of satisfying his wants or his pleasures. Almost all regions doubtless produced what was indispensable for the sustenance of their inhabitants, but not one produced all the fruits that were necessary to meet all real needs, or more particularly all conventional needs. It was, therefore, necessary to have recourse to other nations and to extend commerce. Man, impelled by that instinct which leads him to seek perfection, created new needs for himself as he made new discoveries. He accustomed himself to the use of all the productions of the earth and of its industry. The cotton, sugar, coffee, and tobacco of the New World have become articles of prime necessity for the European, and an immense trade is carried on in them. The American, in turn, can not dispense with the varied productions of European manufacture. The development of commerce, that is to say, the satisfaction of man's instincts of sociability and perfectibility, has greatly contributed to connecting all the nations of the universe; it has served as a vehicle, so to speak, for the performance of the duties of humanity. Commerce is really, therefore, an institution of primitive law; it has its source and its origin in the divine law itself.

And Vattel on the same subject (p. 62) Lays :

Sec. 21. All men ought to find on earth the things they stand in need of. In the primitive state of communion they took them wherever they happened to meet with them if another had not before appropriated them to his own use. The introduction of dominion and property could not deprive men of so essential a right, and, consequently, it can not take place without leaving them, in general, some means of procuring what is useful or necessary to them. This means commerce; by it every man may still supply his wants. Things being now become property, there is no obtaining them without the owner's consent, nor are they usually to be had for nothing, but they may be bought or exchanged for other things of equal value. *Men are, therefore, under an obligation to carry on that commerce with each other if they wish not to deviate from the views of nature*, and this obligation extends also to *whole nations or states*. It is seldom that nature is seen in one place to produce everything necessary for the use of man; one country abounds in corn, another in pastures and cattle, a third in timber and metals, etc. If all those countries trade together, as is agreeable to human nature, no one of them will be without such things as are useful and necessary, and the views of nature, our common mother, will be fulfilled. Further, one country is fitter for some kind of products than for another, as, for instance, fitter for the vine than for tillage. If trade and barter take place, every nation, on the certainty of procuring what it wants, will employ its lands and its industry in the most advantageous

manner, and mankind in general prove gainers by it. Such are the foundations of the general obligations incumbent on nations reciprocally to cultivate commerce.

And I might greatly amplify this. I will read a passage at the bottom of page 62 from Félice on International Commerce (quoting):

The need of this exchange is based upon the laws of nature and upon the wise arrangement which the Supreme Being has established in the world, each region and each portion of which furnishes, indeed, a great variety of productions, but also lacks certain things required for the comfort or needs of man; this obliges man to exchange their commodities with each other and to form bonds of friendship, whereas, otherwise, their passions would impel them to hate and destroy each other.....

The law of commerce is therefore based upon the obligation under which nations are to assist each other mutually, and to contribute, as far as lies in their power, to the happiness of each other.

And Levi, in his work upon International Commercial Law :

Commerce is a law of nature, and the right of trading is a natural right. But it is only an imperfect right, inasmuch as each nation is the sole judge of what is advantageous or disadvantageous to itself; and whether or not it be convenient for her to cultivate any branch of trade, or to open trading intercourse with any one country. Hence it is that no nation has a right to compel another nation to enter into trading intercourse with herself, or to pass laws for the benefit of trading and traders. Yet the refusal of this natural right, whether as against one nation only, or as against all nations, would constitute an offense against international law, and it was this refusal to trade, and the exclusion of British traders from her cities and towns, that led to the war with China.

That war with China may well be referred to as illustrating the proposition, that no nation has an absolute property in any of the gifts of Providence, but that they are given in part upon a trust to share them with others. Let me suppose an article like india rubber, which has become a supreme necessity to the human race all over the world. It is produced in very few places. It is possible that the nation which has dominion over those places might seek to exclude it from the commerce of the world. It might go so far as to attempt to destroy the plantations which produce the tree from which the gum is extracted. Would such an attempt give any right to any other nation? Most certainly it would! It would give a right to other nations to interfere and take possession, if necessary, of the regions in which that article so important, so necessary to mankind, was alone grown, in order that they might supply themselves; and the ground of such action would be that the nation which had possession of this product refused to perform its trust by sharing that blessing.

The President. Do you mean a legal right?

Mr. Carter. I mean a perfect legal right. Let me carry that a little further, if there be any doubt about it. In international law

we have a whole chapter in regard to the instances in which one nation may justly interfere in the affairs of another; and there are numerous instances in history in which such interferences have been had. Take one instance, which is generally spoken of as the means adopted to "preserve the balance of power". When one nation in Europe sees another so extending itself as to threaten what has been denominated the balance of power, this has from an early period in recent European history been deemed a cause of interference, and, if necessary, of war. That interference is defended upon moral grounds, and it is perfectly defensible; for what right has a nation to threaten the peace of the world?

The President. It is one of the forms of self-defence.

Mr. Carter. Now, as I have said before, the benefits of nature were originally given to mankind, and all the members of the human family have a right to participate in them. The coffee of Central America and Arabia is not the exclusive property of those two nations; the tea of China, the rubber of South America, are not the exclusive property of those nations where it is grown; they are the common property of mankind; and if the nations which have the custody of them withdraw them, they are failing in their trust, and other nations have a right to interfere and secure their share.

Lord Hannen. May they sell them at their own price, although it may be a very high price?

Mr. Carter. Yes, until they come to put a price upon these commodities which amounts to a refusal to sell them — when they arrogate to themselves the exclusive benefits of blessings which were intended for all, then you can interfere. I do not dispute the right of a nation to say: "For certain reasonable purposes we must interdict commerce with such and such a place." There may be grounds and reasons for that; there may be reasons why a nation should refuse for a time to carry on commerce at all; there may be exceptional circumstances which would entitle a nation to act in this manner. But what I do assert is that where a nation says: "We will for ever exclude the world from participating in these benefits of which we have sole possession," that nation commits a violation of natural law, and gives other nations a right to interpose and assert for themselves a claim to those blessings to which they are entitled under the law of nature.

And the practice of mankind has universally proceeded upon these principles, let me next assert. Upon what other ground can we defend the seizures by the European Powers of the territories of the New World — the great continents of North and South America? England, France, Spain, nearly all the European maritime nations, engaged in the enterprise of taking possession of enor-

mous tracts of territory in the New World from the peoples which occupied them. They never asked permission; they took them forcibly and against the will of the natives. They said to those uncivilized nations: "These countries are not intended for your sole benefit, but for ours also, and we choose to treat them as such." That policy has been pursued by civilized nations for centuries. Is it robbery, or is it defensible? I assert that it is not robbery, because those barbarous and uncivilized peoples did not apply the comforts they possessed to the purposes for which nature and nature's God intended them; they were not faithful to the trust which was imposed upon them; they were incapable of discharging to mankind the duties which the possessors of such blessings ought to discharge. The nations of Europe say: "These vast tracts of the most fertile parts of the earth, capable of affording measureless comforts to mankind, and of sustaining a valuable commerce shall not be allowed to remain a waste and a desolation. It was not for such purposes that the earth was given to man, and it is the mission of civilized man to take out of the possession of barbarous man whatever can contribute to the benefit of the human race in general, but which is left unimproved.

Senator Morgan here asked a question as to the Conference at Berlin previously referred to by the President, and at which this point was considered. He was understood to ask whether the doctrine now upheld had been then settled as a principle of international law.

Mr. Carter. I cannot say; but I am certain that the practice of mankind from an early period of history has been based upon these principles; and unless these principles are well founded, the whole course of the settlement of the New World is indefensible robbery. What did England do in the case of China in 1840, for instance? She made war upon China and subdued her. Why? The real cause of war is not always correctly stated in the pretext given for it, and in that instance the pretext was, I believe, some discourtesy which had been shown to individuals, some maltreatment of British officials. But if we look into the history of the matter, we find that the dispute began when China closed her ports, and that it terminated with the treaty by which she bound herself to keep them open. This war was defensible; I do not put it as an offence on the part of Great Britain. When a nation refuses to perform the duties incumbent upon her in respect to the blessings confided to her care, there is a cause for the intervention of other nations.

Take the case of Peruvian bark. This product is commonly regarded as absolutely necessary in the economy of society; it is a necessity for the cure of certain diseases; it is a specific for them; they will rage unrestrained unless you have Peruvian bark. Now,

suppose the countries where it is grown should say that for some reason or other they will not carry on commerce; and not only that, but that they propose to devastate the plantations where the bark is cultivated: is mankind going to permit that? I will refer to another and recent example which we read about every day in the newspapers. Why is Great Britain in Egypt maintaining a control over the destiny of that nation? What reason has she for asserting a dominion over these poor Egyptians? Is it because they are weak and defenceless? Is that the only reason? No I suppose that those who have the destinies of Great Britain in their charge can make out a better case than that. Egypt is the pathway of a mighty commerce; it is necessary that that commerce should be free and unrestrained — that great avenue and highway of traffic must be made to yield the utmost benefit of which it is capable. If the Government of Egypt is not capable of making it yield its utmost — if that Government is incapable of doing so, other nations have a right to interfere and see that the trust is performed.

The President. I am afraid that you take a very high point of view, Mr. Carter, because you seem to anticipate the judgments of history. I cannot say more at present.

Mr. Carter. Not a higher view than is sustained by the practice of mankind for three hundred years. If that is a high point of view, it may be as you say, Mr. President; but it is a view which is defensible both as to theory and practice. Will any one maintain that where a broad tract of the earth's surface abounds in a blessing sufficient to afford comfort and convenience to a very large part of mankind — will any one maintain that that nation may, if she choose, wholly withhold from other countries the benefits she is capable of conferring? If that is true, then all that the writers upon the law of nature tell us to the effect that the gifts of Providence were bestowed upon mankind in general — all that is erroneous! Are these statements erroneous? I must appeal to some of them. I may refer to Vattel. He says:

Sec. 203. Hitherto we have considered the nation merely with respect to itself, without any regard to the country which it possesses. Let us now see it established in a country which becomes its own property and habitation. The earth belongs to mankind in general; destined by the Creator to be their common habitation, and to supply them with food, they all possess a natural right to inhabit it, and to derive from it whatever is necessary for their subsistence, and suitable to their wants. (7th Amer. ed. 1849, ch. XVIII.)

I also quote from Bowyer, a distinguished English writer, and from page 127 of his "Commentaries on the Constitutional Law of England":

The institution of property, that is to say, the appropriation to particular

persons and uses of things which were given by God to all mankind is of natural law.

And the great philosopher Locke says in his Treatise on Civil Government :

God who hath given the world to men in common hath also given them reason to make use of it to the best advantage of life and convenience. The earth and all that is therein is given to men for the support and comfort of their being; and though all the fruits it naturally produces, and beasts it feeds, belong to mankind in common, as they are produced by the spontaneous hand of nature; and nobody has originally a private dominion exclusive of the rest of mankind in any of them, as they are thus in their natural state, yet being given for the use of men, there must of necessity be a means to appropriate them some way or other before they can be of any use, or at all beneficial to any particular man.

I read from Sergeant Stephen's Commentaries on the Laws of England, Vol. 1, Book 2, pages 159-165 :

In the beginning of the world, as we are informed by Holy Writ, the All Bountiful Creator gave to man "dominion over all the earth; and over the fish of the sea, and over the fowls of the air, and over every living thing that moveth upon the earth".

Hence the earth and all things therein are the general property of all-mankind, exclusive of other beings, from the immediate gift of the Creator. And while the earth continued bare of inhabitants, it is reasonable to suppose that all was in common among them, and that every one took from the public stock, to his own use, such things as his immediate necessities required.

FROM VATTTEL, 7th American Edition, Book 2, section 21 :

All men ought to find on earth the things they stand in need of. In the primitive state of communion, they took them wherever they happened to meet with them, if another had not before appropriated them to his own use. The introduction of dominion and property could not deprive men of so essential a right; and, consequently, it cannot take place without leaving them, in general, some means of procuring what is useful or necessary to them. This means commerce; by it every man may still supply his wants. Things being now become property, there is no obtaining them without the owner's consent, nor are they usually to be had for nothing; but they may be bought, or exchanged for other things of equal value. *Men are, therefore, under an obligation* to carry on that commerce with each other, if they wish *not to deviate from the views of nature*; and this obligation extends also to *whole nations or states*. It is seldom that nature is seen in one place to produce everything necessary for the use of man; one country abounds in corn, another in pastures and cattle, a third in timber and metals, &c. If all those countries trade together, as is agreeable to human nature, no one of them will be without such things as are useful and necessary; and the views of nature, our common mother, will be fulfilled. Further, one country is fitter for some kind of products than for another, as, for instance, fitter for the vine than for tillage. If trade and barter take place, every nation, on the certainty of procuring what it wants, will employ its lands and its industry in the most advantageous manner, and mankind in general prove gainers by it.

Such are the foundations of the general obligations incumbent on nation reciprocally to cultivate commerce.

International law is filled with statements of the general doctrine, that the earth was given to all mankind for their common benefit and that it must be so appropriated as to enable them to enjoy that common benefit; that commerce is the means by which that common benefit can be extended to all nations, and therefore the carrying on of commerce is an obligation resting upon all nations.

When we speak of an obligation resting upon nations, as it is spoken of by almost every writer who has dealt with the question, we are not dealing in mere empty words. These things are not mentioned by them as meaning nothing. They mean what they say. They mean that this is an obligation, and that it is an obligation which in a suitable case can be enforced.

So much for the first limitation which I have stated property was subject to, whether held by nations or by individuals. It is held subject to a trust for the benefit of the world. As to so much of it as is not needed for the purposes of the particular owner, be that owner nation or man, the benefit of it must be extended on just terms to whose for whose benefit it was designed.

I now have to state a second limitation upon property whether held by nations or by men, and that is, that things themselves are not given, but only the *use* of them. That is all — the use of them. The world is given to be used, and only to be used, not to be destroyed. Men bring into the world their children, those who are to follow them. They are under an obligation to leave the means of support to them. Is it necessary for me to argue that no man has so absolute a property in anything that he can be permitted to destroy it? Surely that is not necessary.

The President. *Uti et abuti*, say the Romans.

Mr. Carter. Yes, there are two things, *uti et abuti*, so that a man may not only use, but abuse. It is given to us to use; it is not given to us to abuse and destroy. We have no right to do that. Property is sometimes said, in municipal law, to be regarded as absolute. If a man chooses to throw away a bushel of wheat, there is nobody to call him to account. The state does not call him to account. It does not do that, because the probability that such a thing will be done is extremely remote. We can safely rely upon the selfish element in human nature to prevent any such thing as that being done. But suppose it was a common thing, and likely to occur, would the laws be silent about it then? By no means. I think I have some citations upon that very point. I will read from a writer of admitted authority, and that is Ahrens. I read from page 97 of my argument:

The definitions of the right of property given by positive laws generally concede to the owner the power to dispose of his object in an almost absolute manner, to use and abuse it, and even through caprice to destroy it; but this arbitrary power is not in keeping with natural law, and positive legislation, obedient to the voice of common sense and reason in the interest of society, has been obliged itself to establish numerous restrictions, which, examined from a philosophic view of law, are the result of rational principles to which the right of property and its exercise are subjected.

The principles which govern socially the right of property relate to substance and to form.

I. As to substance, the following rules may be established :

1. *Property exists for a rational purpose and for a rational use*; it is destined to satisfy the various needs of human life; consequently, *all arbitrary abuse, all arbitrary destruction, are contrary to right (droit)* and should be prohibited by law (*loi*). But to avoid giving a false extension to this principle, it is important to recall to mind that, according to personal rights, that which is committed within the sphere of private life and of that of the family does not come under the application of public law. It is necessary, therefore, that the abuse be public in order that the law may reach it. It belongs to the legislations regulating the various kinds of agricultural, industrial, and commercial property, as well as to penal legislation, to determine the abuses which it is important to protect; and, in reality, legislations as well as police laws, have always specified a certain number of cases of abuses. Besides, all abusive usage is hurtful to society, because it is for the public interest that the object should give the owner the advantages or the services it admits.

He refers also to the occasion of a debate upon the adoption of the French Civil Code, and in respect to article 544, which defined property; in which Napoleon expressed energetically the necessity of suppressing abuses, in this language :

The abuse of property, said he, should be suppressed every time it becomes hurtful to society. Thus, it is not allowed to cut down unripe grain, to pull up famous grapevines. I would not suffer that an individual should smite with sterility 20 leagues of ground in a grain-bearing department, in order to make for himself a park thereof. The right of abuse does not extend so far as to deprive a people of its sustenance.

All this supports the views which I am endeavoring to present to the Tribunal. The definition of property does concede formally to the individual the right to abuse it, a right to destroy it. It concedes the power — I will not say it concedes the right; for it does not concede the right. On the contrary, legislation in a thousand forms is aimed against any destruction of property; and wherever there is any considerable probability that individuals will abuse the right of property, the law will step in to repress it.

The law of nature, the philosophy upon which all law is founded, must necessarily preserve property, and apply, wherever it may be needed, such remedies as may be suitable to prevent any destruction of it. Let me call to mind in how many ways our municipal law exerts its efforts in that direction. We

impose public taxes for the purpose of sustaining bodies of men to make scientific inquiry by which agriculture may be encouraged, and the production of the earth increased; and this shows the effort that society makes not only to prevent the destruction of property, but to increase it. We restock the rivers; we attempt even to restock the seas, and expend a great deal of money in those attempts. These are efforts going further than the effort to preserve property. They are efforts to increase it. They are efforts, indeed, to preserve the sources of blessings which are in the course of extinction. And see how the use of private property is interfered with. Here is an individual; he may be an idiot, a lunatic, a drunkard or a spendthrift, having a large property. Does society permit that man to deal with his property as he likes? No. He is likely to abuse it; he is likely to destroy it. He will not handle it well. It is taken out of his benefit and put into the hands of a trustee. Is it to benefit him particularly? Is it out of tenderness to the feelings or the convenience of a worthless wretch like him? No; it is for the preservation of society. It is for the preservation of that property for the use of society generally. This individual might himself have no heirs at all, and the state might be the next person who would come in and take possession of it at his death. Would that alter the action of society in reference to it? No; it would take the control of it out of his hands just as quickly.

Take a familiar doctrine in the law of admiralty. Here is a vessel at sea. She meets with disaster. She has been dismasted, and is lying helpless upon the bosom of the sea. Another vessel comes there in perfect condition, well rigged, and able to take her into some port in safety. This vessel newly arriving offers the captain on board of this stricken vessel to take him into port for a reasonable salvage. He says, "No, I will find my own way in there. I think I can get there". "Well", the salvor says, "I don't think you can get there; you haven't the means". "No matter whether I have or not", he answers; "I am the owner of this vessel"—and it may be that he is the owner of it—"I am not only the owner of the vessel, but I am the owner of the cargo. The whole thing may be lost, but that is no concern of yours. If it be lost, I shall be the only loser." Now, suppose it to be clear that that man has not the ability to take his vessel into port, has his salvor, the person who comes there any right? Yes; he can take that vessel out of the possession of the master.

Lord Hannen. I should like to have an authority for that.

Mr. Carter. I do not know that I can give any; but I think those are the principles of the law of admiralty.

Lord Hannen. I think I should like to see an authority for it

— that a man can insist upon saving a vessel against the wishes of the owner.

Mr. Carter. I think it is true I will make some effort to discover an authority of that kind. If I am unable to discover it, I will withdraw, certainly, any assertion to the effect that it is the law, but not the assertion that it ought to be the law, until I can find some authority against it. It is not the first time that I have heard the proposition stated, however. I have heard it stated by professional brethren.

What I have said goes to show that the right of property, whether of nations or of individuals, is not absolute under the law of nature, but is subject to limitations — limitations of a twofold character; one that it is held subject to a trust for the benefit of mankind; another that the *use* only is given, and not the absolute thing itself. If the absolute thing itself were given, so that the individual had a right to destroy it, then it would not be proper for human society to take notice of any attempts to destroy property; but there is, as I have said, a vast deal of legislation on the statute books of municipal states based upon this law of nature of which I speak, based upon this policy which ought always to animate the jurisprudence of any nation, namely, to prevent the destruction of property. The preservation of property, and the increase of the amount of property in a community is, or ought to be — is, indeed — the policy of all states. All their legislation, or a great part of their legislation, is enacted for the purpose of securing that end; and indeed the extent to which the institution of property is permitted to be carried is only an illustration of the importance which society attaches, not only the preservation of property, but the increase of the amount of it. Society places no limit to the extent to which property may be held. Attention is often called to the enormous fortunes which individuals acquire, especially in recent times; and the question is sometimes asked, why should individuals be permitted to engross property by the hundreds of millions? When we look into the real nature of it, we see that the permission of carrying the institution of property to that extent, of allowing individual possessions to that extent, is only a part of this generally wise and beneficent system which encourages the preservation of property. Those who are most successful in the acquisition of property, and who acquire it to such an enormous extent are the very men who are able to control it, to invest it, and to handle it in the way most useful to society. It is because they have those qualities that they are able to engross it to so large an extent. They really own, in any just sense of the word, only what they consume. The rest is all held for the benefit of the public. They are the custodians of it. They invest it; they see that it is

put into this employment, that employment, another employment. All labor is employed by it, and employed in the best manner; and it is thus made the most productive. These men who acquire these hundreds of millions are really groaning under a servitude to the rest of society; for that is practically their condition. And society really endures it because it is best for them that it should be so.

I have called the attention of the Tribunal to the various forms and methods in which society manifests and enforces its policy of preserving property and increasing the amount of property and making the natural bounties of the earth more productive. I have pointed out several modes in which that policy is illustrated. I could point out many more. I have this further suggestion to make upon that point: that it is one of the duties particularly incumbent upon civilized society to take these methods and means of preserving property and of preserving the sources from which property proceeds, because civilization makes a very dangerous attack upon the fruits of the earth. The moment the numbers of mankind are increased, the attack which is made upon the fruits of the earth which can support and maintain mankind, are proportionately increased; and there is danger, therefore, of destroying them. There is danger of destroying the races of animals, and therefore with the increased attack which civilization brings there comes a corresponding duty resting upon civilization to prevent those attacks from becoming effective. I might, and shall by and by, bring this argument to bear upon the case of these seals. When these seals were discovered a hundred years ago, they were a blessing tributary only to barbaric man. A few hundreds were all that were taken. And those few hundreds — it may have been a few thousands — sufficed to supply all the wants of the inhabitants along the shores where they were found. That was the only attack which the barbaric world made upon this bounty of Providence; but civilization and commerce come in now, and what is the result? The whole world is attacking them. Everybody that wants a seal-skin, in Europe, or Asia, or South America, or China is attacking these few remaining herds; and of course there is nothing that can withstand that attack unless civilization brings along with it some remedy by which this attack can be resisted and its consequences averted.

The President. Did those Indians take the seal at sea as well as on the islands?

Sir Charles Russell. At sea.

Mr. Carter. They did. That was their only mode, indeed, of taking them. There were no inhabitants originally on the Pribilof Islands.

The President. It was the original mode of catching the seal, to take him at sea?

Mr. Carter. It was the only mode by which they were originally caught. The weapon with which they were thus taken was the spear.

Senator Morgan. Mr. Carter, I understand that the statutes of the United States claim the property in seals as against their own citizens, as an absolute right?

Mr. Carter. Yes.

Senator Morgan. They protect them by criminal, penal enactment?

Sir Charles Russell. There is no statute that says anything about property in seals.

Mr. Carter. There is a statute—it does not say anything about it, but it has the effect. It is the effect of laws we are speaking about.

Senator Morgan. It forbids citizens taking seals at all, or holding any property in them?

Mr. Carter. Yes.

Senator Morgan. Suppose this Tribunal should hold that the United States Government have no property in seals, either absolute or qualified; then following that decision, would it be the moral duty of the United States to repeal her statutes on that subject?

Mr. Carter. No; I hardly think it would be. If we were going to speak of moral duties, I think the United States, notwithstanding such a decision of this Tribunal, would be well justified in saying that to allow those animals to be destroyed upon the high seas is an inhuman and barbarous practice which they, at least, would forbid, so far as they could do it.

Senator Morgan. Suppose the United States should conclude to repeal her laws on that subject; what would become of the seals?

Mr. Carter. The seals will disappear, whether she repeals her laws or not, if pelagic sealing is allowed to continue. It is not worth while to discuss—at least, I so think—as to what the fate of these seals will be if pelagic sealing is permitted. Of course, following up the suggestion of the learned Arbitrator, we can easily see this; that the moment when from any cause it ceases to be remunerative to the lessees of the Pribilof Islands to maintain a watch over those islands, they will leave the islands and give up the watch, and that moment, of course, the seals are gone; because they then will be subject to the depredations of every marauder who chooses to go there. They will go then as they have gone on the islands of the Southern Pacific. The moment the guard is taken from the Pribilof Islands, the fate of the seals is fixed.

I must finish this line of my argument by summarizing the conclusions which I think I have established. They are :

First. The institution of property springs from and rests upon two prime necessities of the human race :

1. The establishment of peace and order, which is necessary to the existence of any form of society.

2. The preservation and increase of the useful products of the earth, in order to furnish an adequate supply for the constantly increasing demands of civilized society.

Second. These reasons, upon which the institution of property is founded, require that every *useful* thing, the supply of which is *limited*, and which is capable of ownership, should be assigned to some legal and determinate owner.

Third. The extent of the dominion which, by the law of nature, is conferred upon particular nations over the things of the earth, is limited in two ways :

1. They are not made the absolute owners. Their title is coupled with a trust for the benefit of mankind. The human race is entitled to participate in the *enjoyment*.

2. As a corollary or part of the last foregoing proposition, the things themselves are not given; but only the *increase* or *usufruct* thereof.

I think I will devote the few remaining minutes before the hour of adjournment arrives to the perusal of some authorities bearing upon these conclusions which are not in my written argument, but which I have had printed, and a copy of which I will hereafter deliver to my friends on the other side.

The President. Are those the citations mentioned in our first sitting, which were left out by the printer?

Mr. Carter. No, Mr. President, they are not those, but they are the best substitute that I have been able to make for them. Quite a number of citations have been sent to me from New York; but they do not include that special list, although some of them may belong to it.

The President. You will never be able to make up that list again?

Mr. Carter. No; I cannot reproduce that, but it is the best substitute I can furnish. It is composed, let me say, in part of quite a number of authorities which I had thought less significant, and which I had rejected in making up that list. I have been compelled to use them in the preparation of this. I will read from Schouler, an American writer on the law of personal property, and from his introductory chapter, part I :

Prior to all positive institutions exists the truth that to mankind belong the things of this earth as a gift from above. The right to acquire, and to

exercise dominion over these things "to subdue" the earth, as it is said — is universally felt to be a natural right; while the corresponding desire of acquisition is one of the strongest in the human heart; — that which prompts the unlettered and undisciplined savage to plunder and kill for the sake of greedy spoils, but among a well ordered and refined people may be found the mainspring of civilization. Nor is the gift of external things to the human race absolute and without limitation, for it is conceded to be something designed for beneficial use and not for wanton injury; to be enjoyed and not to be abused. The inferior animals may minister to our wants; else they should not be killed and maimed by us for mere pastime, or when the duty of self-protection can afford no reasonable excuse. The soil should be cultivated and improved as far as possible — not ravaged, laid waste, and left desolate, save where some terrible lesson of good to mankind may furnish a sufficient means of justification. Nature teaches the lesson doubly enforced by revelation, that the right of the human race to own and exercise dominion over the things of this earth in successive generations carries with it a corresponding moral obligation to use, enjoy, and transmit in due course for the benefit of the whole human race, not for ourselves only or for those who preceded us, but for all who are yet to come besides, that the grand purpose of the Creator and Giver may be fully accomplished.

And from Caulfield Herron, an English writer, Introduction to the History of Jurisprudence, Bk I. ch. IV, p. 71 :

Property is the right of using. The right of property is founded upon its subserviency to the subsistence and well-being of mankind. The institution of property is necessary for social order. The exclusive appropriation of things is essential for the full enjoyment of them... It is the principal foundation of social improvement; it leads to the cultivation of the earth, the institution of government, the establishment of justice. In the right of property Bentham includes four things : 1. The right of occupation; 2. The right of excluding others; 3. The right of disposition; 4. The right of transmission.

The Arbitrators will perceive that these authorities fully support what I have been endeavoring to day down.

I now read from De Rayneval, a French writer on the Law of Nature and Nations, section 2, page 96 :

Property did not exist in the primitive state of the world, and it is no more inherent in human nature than heredity. Originally men did not possess more than the animals possess to-day. The earth was common to all and belonged to no one. When agriculture became necessary for the sustenance of man, each was partial naturally to the earth which he had cleared by the sweat of his brow, and which offered him the fruit and the recompense of his labor; whence the first idea of preservation and property; whence also, the quarrels which the exclusive right must have caused upon the ground that it was invoked for the first time. These quarrels must have finally led to compromises; these compromises introduced the right to enjoy exclusively the earth which each had cleared and cultivated, and this is the most reasonable origin of property. It has then been introduced for the maintenance of peace among men. It has then been the principle of their union and social order.

From John Penford Thomas, an English writer, in his *Treatise on Universal Jurisprudence*, ch. II, p. 25 :

All things belonged originally to mankind in common. The benign Giver of all gifts did not distribute them to some to the exclusion of the rest of the species. In the state of a community of things the first bodily occupancy and use of so much only as human wants from time to time required supplied the place of property. In the primitive state every man had a right not to be hindered from using whatever land or produce he had appropriated to himself and he immediately wanted for rational use, and the bestowment of bodily labour on a thing was the only mode of acquiring a positive title to it. Agriculture could not flourish, nor its fruits be improved or ripened into maturity. Ingenuity was not sufficiently rewarded, disputes continually arose; the ingenuity and industry of man were checked. Pre-occupation by slow degrees communicated with the consent of man either express or implied a right of appropriation; and the introduction of money has greatly extended it. The increased wants, improved agriculture, and valuable elegancies of incipient civilization gave birth to the distinctions of property.

[The Tribunal thereupon adjourned until Thursday, April 20, 1893, at 11.30 o'clock a.m].

TWELFTH DAY. APRIL 20TH, 1893

[The Tribunal convened pursuant to adjournment.]

The President. Mr. Carter, will you proceed?

Mr. Carter. Mr. President, my argument yesterday had a two-fold character. It was designed, in the first place, to show that by the doctrines of municipal law everywhere accepted, the fur-seals were the property of the United States. In the next place, my purpose was, if there were any doubts concerning that conclusion arising out of differences between the nature and habits of the seals and those of other animals in respect to which the question of property had been decided by the municipal law, to more particularly explain that the proper way to remove them was to look to the foundation upon which the institution of property itself stood, and that if we should find that there were the same reasons for awarding to the United States property in the fur-seals as there were for awarding property in anything, the conclusion would become, as it seemed to me, irresistible. With that view I engaged in an inquiry into the general foundations of the law of property with the view of showing that property was not founded upon robbery or force, or based upon any arbitrary distinctions, but that it was established for great social purposes and to satisfy great social necessities; that the earth was originally the common property of the race, and that the division of the face of the earth into distinct possessions allotted to different nations, did not displace the right of mankind in general to an enjoyment of all the benefits of the earth; that the establishment of the institution of property so far from displacing this right, was really the principal means and the effective means, by which that right was worked out and made practically available; that consequently the right of property whether in nations or in individuals was subject to two limitations, the first was that it was not held by an absolute title; that so far as any nation had more of a thing than its necessities required it held the superabundance subject to a trust for the benefit of mankind. Second, that the *use* only of things is given, not the stock, or principal thing; that that was to be preserved for the benefit of future generations. I next endeavored to show that these deductions from the law of

nature were confirmed by the actual practice and usage of mankind; that, although under municipal law as between individuals one could not call another to account for an abuse of the right of property or for an attempt to destroy it, and there were not generally, laws for the correction of abuses of the law of property by individuals, the motive of self-interest being sufficient for the purposes of protection, yet there were, or might be, exceptional cases even in municipal policy where there were dangers that individuals would abuse the right of property and in which the state would prevent that abuse; that the practice of nations still further illustrated the truth that the title to property was not absolute, and that wherever there was a nation in possession of a great bounty of Providence, any source of happiness and advantage to mankind, which it failed to use for the benefit of mankind, other nations might assert a right to interfere and take possession of it and turn it to the general benefit; that the whole policy of the colonization by civilized states of the newly discovered regions of the globe was a constant illustration of that truth and of that policy, and that it was defensible upon that ground and upon that ground alone. It is true that there have been a thousand excesses committed in the course of carrying out those policies of colonization. The excesses cannot be defended, but the policy itself is entirely defensible.

These views, as it seems to me, respecting the origin and foundation of property and the reasons upon which it stands furnish a true and sufficient answer, and the only sufficient answer, to the attacks of socialism upon the institution of property. They regard the institution of property as proceeding from great social necessities, and as founded upon the nature of man himself, and consequently they assure the everlasting perpetuity of the institution. So long as the nature of man remains unchanged the institution of private property, the most beneficent of all the fruits of civilization, will remain also.

In the course of my observations on the value which municipal law assigns to the preservation of property itself, I had occasion to recur to an instance which I supposed the law of Admiralty furnished, namely, in cases of salvage. I stated, what I supposed to be the law, that a salvor on the high seas meeting with a ship that was absolutely disabled and unable to save itself by its own means and its own resources, might take possession of it, even against the will of the master, and even though the master were himself the owner. One of the learned arbitrators (Lord Hannen) requested to be furnished with an authority upon that point. It was rather disturbing to me, I confess, to have a doubt suggested from such a source.

Lord Hannen. I thought you were stating it too broadly ; that was all.

Mr. Carter. Yes ; I was afraid I had stated it too broadly. I have no access here to books of reports either American or English, to ascertain fully what has passed into judgment ; but I did recur to one or two text-writers, and I have something upon that subject which may be deemed pertinent. Prof. Parsons in his work upon maritime law, which is a book of recognized authority, he having been for many years a leading professor in the principal law school of the United States (that of Harvard) says this, (page 264, Vol. II, Parsons on Shipping and Admiralty) :

It has been made a question whether persons forcibly taking possession of a vessel against the will of the master can claim as salvors. But we think it must be obvious and certain that, on the one hand, the master's reluctance or resistance to the saving of the property under his charge should not bar the claims of salvors, but rather enhance them, if their services were necessary, or in all respects meritorious and useful. But on the other hand his opposition would be a circumstance of great weight in determining whether their services were necessary or meritorious.

Sir Charles Russell. I think that is not the case where the master is the owner.

Mr. Carter. I think it is. Do you mean to say that Prof. Parsons does not so intend ?

Sir Charles Russell. No ; he is dealing with the case of the representative of the owner — the master, not the owner himself.

Mr. Carter. What the case is, with which he is dealing I am unable to say, not having access to any Reports ; but the principle which he lays down is, that the reluctance of the person in charge of the property, his opposition to the taking possession of the salvor, does not detract from the claim of the salvor, but rather enhances it ; and if that be true in reference to the master of the ship, I rather think it follows as a necessary consequence that it would be true even if he were the owner at the same time. If the owner of a vessel has the right to say to the salvors, " You must not take possession of it," he can commit that right to an agent.

It will be my purpose now to endeavor to make an application of these views as to the grounds and reasons upon which the institution of property rests to the particular question which is before us. The general principles I have gone through at some length. I make no apology for going with them at that length ; for the question which this Tribunal is to try is a question of property as between nations. It is the first time, so far as I am aware, that any such question has been submitted to an international tribunal, or indeed to any tribunal at all ; and the decision of it, therefore,

requires a thorough investigation into the grounds and reasons upon which the institution of property rests.

In order to apply these views to the case before us it is necessary, of course, that we should have a more particular and precise view of the facts in relation to the fur-seals themselves; we should have a clear knowledge of the facts respecting their nature and habits; the methods by which they are pursued and captured; the dangers which threaten the existence of this species of animal, and the means which we can employ to avert those dangers.

The Arbitrators will bear in mind one of the general conclusions which I had reached in respect to the right of property was this: That it extended to everything which embraced these three conditions: First, that it was an object of utility and desire to man; second, that the supply was limited, that there was not enough for all; and third, that it was capable of exclusive appropriation

Now, first as to the *utility* of these animals. That is obvious and conceded. Every part of them is useful to man, their skins, their flesh and the oil which they afford; but their skins are the most useful part, as they furnish a garment of great beauty and utility and which is greatly desired all over the globe. The extraordinary eagerness with which the animals are pursued is full evidence of their utility, and the great prices which these skins bear in the market also evidences that fact so completely that I need not dwell upon it any further.

Next, as to their nature and habits. Where are we to go for our sources of information upon that topic. What is the evidence before this Tribunal to which it can resort for the purpose of informing itself respecting those facts? There are several classes of evidence. In the first place, there is a large body of common knowledge in respect to animals, their nature and habits, which every intelligent person is supposed to possess, and all this may properly be appealed to. In the next place, there are the works of naturalists of recognized authority which may also be appealed to, works written in whatever language, by men who have given themselves to those studies to such an extent as to establish themselves as authorities upon the topics of which they treat. In the next place there are the reports of the Commissioners appointed under the terms of the Treaty, which as will be perceived, from examining the treaty, are made evidence; and although the Commissioners could be personally cognizant of only a small part of the facts which it was necessary for them to learn, still their reports, and their opinions are made evidence, not only in relation to facts which fell under their observation, but facts of which they gained their knowledge by such methods as seemed to them suitable and best. Both the joint and several reports are alike made evidence.

I do not say they are made evidence of equal value, but they are both made evidence for the information of this Tribunal.

Besides that we have, from eachside, a very large number of depositions of witnesses whose testimony has been taken, *ex parte*, of course, because there was no opportunity for cross-examination; but nevertheless they are a source of information in the nature of the testimony of witnesses, the best which the nature of the case admits of; and both parties have resorted to them. Upon two of those descriptions of evidence I have an observation to make as to their relative and comparative utility and trustworthiness before this body. First let me speak in reference to the depositions of the witnesses. These will be found, to a certain extent concurring, and to a certain extent, conflicting. They are the depositions of witnesses whose characters, stations and apparent trustworthiness are very different. We have some of great intelligence, and supposed impartiality, who have had opportunities of observing the habits of these animals; and among these may be mentioned the various agents of the United States, and of the lessees of the United States, who have lived upon these islands for years and made the seals a subject of observation. Obviously the testimony of those men, intelligent observers, is entitled to very great weight. In the next place there are depositions of other witnesses who have visited the islands for other reasons, but have had means of observation, not so extensive as those to whom I have alluded, but still good means of observation; and their evidence is also of considerable weight. Then we have the evidence of a great number of what I may call common witnesses—the Indians, the Aleuts, the natives on the islands; the Indians along the shore; the Indians and whites engaged in pelagic sealing. There are depositions in multitude from persons of that character and description. Their opportunities for observation are good. The trouble about them is that they do not practice much care in expressing themselves; and their trustworthiness is by no means so good as the witnesses which I have before mentioned. We know that they belong to a class whose characters, interests, whose habits, do not furnish the strongest assurance that they are speaking the truth; and therefore the testimony of such witnesses must be taken with a considerable—a very great—degree of caution.

In the British Counter Case will be found various affidavits tending to show that certain persons whose affidavits were given in the Case of the United States were not correctly reported by the persons who took their affidavits; statements by them that they did not say things which were imputed to them; and those impeaching evidences go very far, necessarily, to discredit those witnesses. Where it is shown that a witness has made two different statements

at two different times, it does not show, indeed, which one of the statements is true, or whether either of them is true, but it does show that that witness is not to be credited. The number of the instances, however, in which the testimony of witnesses on the part of the United States has been successfully impeached on those grounds is comparatively small. The great bulk of the testimony remains unimpeached.

The value of testimony of this character depends very largely upon whether the side against which it is, or is sought to be, used, has had any opportunity of scrutinizing it, and of impeaching it in the various ways in which the testimony of a witness can be impeached. If it passes that ordeal, that is one very considerable circumstance in its favor, and it may be the more properly relied upon if it has successfully passed such an ordeal as that. All the testimony of this character, or substantially all, upon which the Government of the United States relies has been freely and fully submitted to Great Britain and its agents for the purposes of criticism and impeachment. Their testimony of the same character, however, has never been submitted to us. I have already remarked in speaking upon the motion which has been before the Tribunal of the inequality to which the United States was subjected in that particular. I have remarked upon the plain and obvious advantages which Great Britain enjoys in the way of refuting, criticising and impeaching the testimony of our witnesses. I have now to say, in view of the circumstance that ours was freely submitted to them, and that they chose, without any good reason, to reserve theirs from our criticism, that ours is entitled to the greater credit wherever they come in conflict.

So much for the testimony of these witnesses. I am not going to criticise them in detail because I have not the time. That work will be done by another. I have something to say in reference to the comparative merits of these joint and several reports of Commissioners.

Senator Morgan. Mr. Carter, is there any motion to exclude, that part of the testimony in the British Counter Case — on the ground that it ought to have gone into the Case?

Mr. Carter. No; we have made none. No motion of that kind, is made. I have pointed out the difficulties which would attend the making of such a motion; the embarrassing results which success upon such a motion would lead to; and the final conclusion of those who have represented the United States that they would on the whole, accept that testimony, and deal with it — with its weight, its credibility and its trustworthiness — by bringing to bear upon its trustworthiness the considerations which I have now mentioned. In commenting upon its weight and trustworthiness before this

Tribunal, we shall rely upon the circumstance that our testimony of this sort was submitted to our opponents and they carefully reserved theirs from our attack.

As to these reports : What was the purpose for which these Joint Commissioners were appointed? I have spoken to that point already in what I said upon the argument of the motion to which I have referred. The idea was originally suggested in the scheme of settlement which Sir Julian Pauncefote proposed to Mr. Blaine.

Senator Morgan. You mean the draft convention?

Mr. Carter. That draft convention, in 1890. The suggestion came from Sir Julian Pauncefote that the two Governments were not agreed as to what the facts were in reference to seal life, and the modes by which the seals were pursued upon the sea and upon the islands. His notion was that if they were agreed upon the facts it would probably be easy to settle the controversy by a convention, and that the proper course was to make an attempt to arrive at an agreement upon the facts by appointing men of intelligence, men of science — in one word *experts* — whose testimony could be trusted; make them joint commissioners, send them out to the islands; have them make an investigation of all the facts connected with seal life and the methods by which seals were pursued, and report the facts and report what in their opinion would be proper regulations designed to preserve the seals from extermination. The idea, therefore, assumed that these joint Commissioners were persons who were entirely to be trusted — trusted as to their intelligence, as to their impartiality, as to their scientific attainments, and as to all qualities which serve to recommend the opinions of men. They were to be a commission of experts.

My learned friend, Sir Charles, made the observation while he was speaking upon the motion referred to that it did not appear to him that there was any particular *sanctity* connected with the reports of these Joint Commissioners. I beg leave to differ with him upon that point.. There was a great deal of *sanctity* — using that word in the sense of importance — attached to them. It was supposed that these Joint Commissioners would furnish these two Governments with the absolute truth upon the questions which they were appointed to examine and that they would so furnish them with the truth that there would be no difficulty in reaching an adjustment of the controversy by the establishment of regulations designed to preserve the seals.

That was the view upon which these Joint Commissioners were appointed; and we have their reports here. These gentlemen were all of them men of the highest character. They were all of high

attainments and perfectly competent to make a thorough investigation of the questions submitted to them and to ascertain the truth and make that truth apparent in their reports. The Commissioners on the part of the United States adopted that view of their functions. They conceived that they nothing to do with differences between the two Governments; that the question whether the United States had a superior claim or right to that of citizens of other nations to the seals was something with which they had no concern; that the question whether the citizens of other nations had the right to pursue the seals on the high seas was a question with which they had no concern; that the only point which they were to investigate was what methods must be pursued in order that the race of fur seals might be preserved from extinction. In other words, they looked upon the question, not from the point of view that here are different nations both of them capable of reaching the seals, the United States capable of reaching them on land, and other nations capable of reaching them on the sea, and that there was no common authority to control those rights. They did not look upon it in that point of view. They looked upon it as if the whole world were one country, and as if all mankind had the same interest in the question and the only thing to be ascertained was what measures were necessary in order to preserve the seals, leaving the question as to whether those measures might, agreeable to the views of different countries, be settled by diplomatic agencies which had power over such questions.

This is what the Commissioners of the United States say as to what they conceive to be their functions, (page 315 Case of the United States) :

Desiring to remove every obstacle in the way of the immediate consideration of this subject, the question of the formality of the Conference was waived on our side and the formal meetings of the Commissioners in Joint Conference began on the afternoon of February 11, at the Department of State.

Mr. Joseph Stanley-Brown was selected as the secretary of the Joint Commission on the part of the United States, and Mr. Ashley Froude on the part Great Britain. In determining the nature of the Conference it was agreed that in order to allow of the freest possible discussion and presentation of views, no formal record of the proceedings should be kept and that none but the four members of the Commission should be present during its deliberations. In further attempt to remove all restrictions upon the fullest expression of opinions during the Conference, it was agreed that in our several reports no reference to persons, as related to views or opinions expressed by members of the Commission during the Conference, should be made.

Meetings of the Joint Commission were held almost daily from the 11th of February until the 4th of March, on which day the joint report was signed and the Conference adjourned *sine die*.

Early in the progress of the Conference it became evident that there were wide differences of opinion, not only as to conclusions, but also as to facts. It seems proper here to refer briefly to the attitude of the Commissioners on

the part of the United States or to the standpoint from which they endeavoured to consider the questions involved.

The instructions under which we acted are contained in Article IX of the Arbitration Convention, and, as far as relates to the nature of the inquiry, are as follows :

“ Each Government shall appoint two Commissioners to investigate conjointly with the Commissioners of the other Government all the facts having relation to seal life in Bering Sea, and the measures necessary for its proper protection and preservation.”

This sentence appears to be simple in its character and entirely clear as to its meaning. The measures to be recommended were such as in our judgment necessary and sufficient to secure the proper protection and preservation of seal life. With questions of international rights, treaty provisions, commercial interests, or political relations we had nothing to do. It was our opinion that the considerations of the Joint Commission ought to have been restricted to this phase of the question, so clearly put forth in the agreement under which the Commission was organized, and so evidently the original intent of both Governments when the investigation was in contemplation.

Had the preservation and perpetuation of seal life alone been considered, as was urged by us, there is little doubt that the joint report would have been of a much more satisfactory nature, and that it would have included much more than a mere reiteration of the now universally admitted fact that the number of seals on and frequenting the Pribilof Islands is now less than in former years, and that the hand of man is responsible for this diminution.

That our own view of the nature of the task before us was not shared by our colleagues representing the other side was soon manifest, and it became clear that no sort of an agreement sufficiently comprehensive to be worthy of consideration and at the same time definite enough to allow its consequences to be thought out, could be reached by the Joint Commission unless we were willing to surrender absolutely our opinions as to the effect of pelagic sealing on the life of the seal herd, which opinions were founded upon a careful and impartial study of the whole question, involving the results of our own observations and those of many others.

Under such circumstances the only course open to us was to decline to accede to any proposition which failed to offer a reasonable chance for the preservation and protection of seal life, or which, although apparently looking in the right direction, was, by reason of the vagueness and ambiguity of its terms, incapable of definite interpretation and generally uncertain as to meaning. In obedience to the requirements of the Arbitration Convention that “ the four Commissioners shall, so far as they may be able to agree, make a joint report to each of the two Governments,” the final output of the Joint Commission assumed the form of the joint report submitted on March 4, it being found impossible in the end for the Commissioners to agree upon more than a single general proposition relating to the decadence of seal life on the Pribilof Islands. It therefore becomes necessary, in accordance with the further provision of said Convention, for us to submit in this, our separate report, a tolerably full discussion of the whole question, as we view it from the standpoint referred to above as being the only method of treatment which insures entire independence of thought or permits a logical interpretation of the facts.

But the British Commissioners took an entirely different view of their functions. Their view was that this herd of seals having its home on the Pribilof Islands, certain superior advantages and

facilities were enjoyed by the Government of the United States for taking them on the Islands; that, on the other hand, the seals were during a large part of the year in the high seas, where they could be pursued by the citizens of other nations; that under these circumstances the citizens of other nations had the same right to pursue them on the sea that the United States had to take them on the land, and that their function and office was to contrive such regulations consistent with that supposition of respective national rights as would best tend to preserve the seals. That view is manifest all over their report; but I will read a section or two which serves to bring it out very clearly; beginning with Section 123 found on page 20 :

123. Besides the general right of all to hunt and take the fur-seal on the high seas, there are, however, some special interests in such hunting, of a prescriptive kind, arising from use and immemorial custom, such as those of the " natives " of the Pribyloff Islands, and of the inhabitants of the Aleutian Islands, of South-eastern Alaska, of the coast of British Columbia, and of the State of Washington. There are also rights dependent on local position, such as those of the Governments possessing the breeding islands and those controlling the territorial waters in or adjacent to which the seals spend the winter half of the year. Such rights do not, however, depend on position only, but also on the fact that the seals necessarily derive their sustenance from the fish which frequent these waters, which, if not thus consumed by the seals, would be available for capture by the people of the adjacent coasts. The rights of this kind which flow from the possession of the breeding islands are well known and generally acknowledged, but those of a similar nature resulting from the situation of the winter home of the seal along the coast of British Columbia have not till lately been fully appreciated.

124. Referring more particularly to the Pribyloff Islands, it must perhaps be assumed that no arrangement would be entertained would throw the cost of the setting apart of these islands as breeding grounds on the United States' Government, together with that of the support of some 300 natives.

It may be noted, however, that some such arrangement would offer perhaps the best and simplest solution of the present conflict of interests, for the citizens of the United States would still possess equal rights with all others to take seals at sea, and in consequence of the proximity of their territory to the sealing grounds, they would probably become the principal beneficiaries.

125. Any such disinterested protection of breeding islands either by Russia or the United States would possess the extreme simplicity of being entirely under the control of a single Government, whereas in every other project it becomes necessary to face the far more difficult problem of international agreement to some code of regulations involving an accompanying curtailment of rights. In other words, any such arrangement must be viewed either as a concession of certain rights on the high seas, or a concession of peculiar rights devolving from territorial possession of the breeding islands of the seal, made in each case for the purpose of inducing equivalent concessions on the other side in the common interest.

126. For practical purposes, the main consideration is that any scheme of measures of protection shall absolutely control, so far as may be necessary, any and every method of taking seals; and from industrial considerations, and in order properly to determine on reciprocal concessions, it is necessary

to assume some ruling principle in accordance with which these shall be governed, and such may be found, in a rough way, in postulating a parity of interests as between pelagic sealing and sealing on the breeding islands. This would involve the idea that any regulation of the fishery, as a whole, should be so framed as to afford as nearly as possible an equal share in benefit or proceeds to these two interests.

There we see the views upon which the Commissioners on the part of Great Britain proceeded. They conceived that, here was a conflict between the rights of nations, which must be taken into account in any consideration of measures necessary to the preservation of the seals, because that conflict between the different rights of nations could not be settled by any scheme of regulations which would in effect take away the supposed right of one nation. In their view the seals must perish before that could be done; and they conceived that they should postulate, a parity of interests between the United States Government having the control of the breeding places, and the pelagic sealers who could pursue them at sea. All their investigations, their opinions and their reports are made upon that basis. In other words, they conceived themselves to be in charge of the interests of pelagic sealing, then, for the most part, represented by Canada.

They conceived themselves to be in charge of that interest, and bound to defend it; and consequently their report will be found to be from one end to the other a defence of the interest of pelagic sealing. That is the character of it. I do not mean to complain of this, or to urge it against those distinguished gentlemen who were the authors of this report as any piece of unfairness. I only state the fact that that was *their conception of their duties*, and that we must take that fact into account in considering their report. And this is a pretty decisive fact. In what category does it place them? It makes them partisans at once, just as much as my learned friends on the other side are. They are defending from beginning to end the interest of pelagic sealers.

How does that operate on the measure of confidence which this Tribunal should place in their conclusions? It is entirely destructive of it. That is the simple result. It is entirely destructive, except as to a very limited extent. Where these gentlemen speak and testify as to facts which they say fell under their personal observation, they are to be treated as witnesses to those facts of the most unimpeachable character, but, nevertheless, witnesses testifying under a strong bias. Where, on the other hand, they proceed to give us their *opinions* as to what the facts are, such opinions are to be discarded altogether as being the opinions of, not impartial, but of partisan observers. They are like the opinions of counsel, and they differ in no respect from them.

That, I venture to say, was an entirely erroneous construction of their duties as marked out by the treaty. The conception of the treaty was that the opinions of these gentlemen as to facts, should have the highest value and should prove the existence of the facts themselves quite independently of the question as to whether they had actually observed the facts themselves. What the two Governments wanted to know was what the facts were. They sent these Commissioners there to inquire what the facts were. Of course they could not ascertain them all, or but a very small part of them by personal observation. They were sent, to make inquiries, and to communicate to the two Governments concerned the results of their inquiries upon questions of fact, and, therefore, their opinions were designed to be — and if they acted in accordance with this conception of their functions, would justly be good evidence of the facts. They were to make joint inquiries too; but I would not draw a very close line between the methods by which they gained their information, whether by point or by separate inquiry.

If they had the proper conception of their functions, their opinions, drawn from the best sources which were open to them, as to the facts and as to the measures necessary for the preservation of the fur-seal, would be regarded as evidence, and evidence of the highest character; but it all depends upon the question whether they were acting impartially, and whether they were acting in accordance with that conception of their duties under which they were appointed.

The President. In point of fact they made separate observations, did they not?

Mr. Carter. Oh yes; they did make separate observations. Of course the general intent of the treaty undoubtedly was that these observations were to be joint. If both sets of Commissioners had acted in accordance with that conception of their duties which is marked out in the treaty, I do not think any serious differences would have arisen between them upon facts which they did not jointly investigate.

With these observations concerning the relative weight which is to be assigned to the reports of the Commissioners, I proceed to state the facts in reference to the nature and habits of the seals; and for that purpose I shall employ the report of the American Commissioners; for it states them with the greatest precision, with the greatest apparent impartiality; and I think it will be found that that statement of facts thus made by them is abundantly established by the testimony in the Case.

The President. Do you intend to make your observations in regard to the parts in which both sets of Commissioners were

agreed, or do you intend to make them merely as to the American observations?

Mr. Carter. I now take the American observations — the report of the American Commissioners as to the nature and habits of the fur-seal as showing what the fact is.

The President. Without noticing what the British Commissioners concur in?

Mr. Carter. Without noticing whether the British Commissioners concur or not. I shall point out presently that the British Commissioners, although their report contains a multitude of doubts as to whether this or that is true, of conjectures that this or that other thing may be true, yet when you come to see whether they really dissent from this statement of facts by the American Commissioners, the dissent will be found to be of very inconsiderable.

Now to show the facts as to the life-history of the fur-seal, I read from the Report of the American Commissioners :

1. The Northern fur-seal (*Callorhinus ursinus*) is an inhabitant of Bering Sea and the Sea of Okhotsk, where it breeds on rocky islands. Only four breeding colonies are known, namely, (1) on the Pribilof Islands, belonging to the United States; (2) on the Commander Islands, belonging to Russia; (3) on Robben Reef, belonging to Russia, and (4) on the Kurile Islands, belonging to Japan. The Pribilof and Commander Islands are in Bering Sea; Robben Reef is in the Sea of Okhotsk near the island of Saghalien, and the Kurile Islands are between Yezo and Kamchatka. The species is not known to breed in any other part of the world. The fur-seals of Lobos Island and the south seas, and also those of the Galapagos Islands and the islands off Lower California, belong to widely different species and are placed in different genera from the Northern fur-seal.

2. In winter the fur-seals migrate into the North Pacific Ocean. The herds from the Commander Islands, Robben Reef, and the Kurile Islands move south along the Japan coast, while the herd belonging to the Pribilof Islands leaves Bering Sea by the eastern passes of the Aleutian chain.

3. The fur-seals of the Pribilof Islands do not mix with those of the Commander and Kurile Islands at any time of the year. In summer the two herds remain entirely distinct, separated by a water interval of several hundred miles; and in their winter migrations those from the Pribilof Islands follow the American coast in a southeasterly direction, while those from the Commander and Kurile Islands follow the Siberian and Japan coasts in a southwesterly direction, the two herds being separated in winter by a water interval of several thousand miles. This regularity in the movements of the different herds is in obedience to the well known law that *migratory animals follow definite routes in migration and return year after year to the same places to breed*. Were it not for this law there would be no such thing as stability of species for interbreeding and existence under diverse physiographic conditions would destroy all specific characters (1).

1. The home of a species is the area over which it breeds. It is well known to naturalists that migratory animals, whether mammals, birds, fishes, or members of other groups, leave their homes for a part of the year because the climatic conditions or the food supply become unsuited to their needs; and that wherever the home of a

The pelage of the Pribilof fur-seals differs so markedly from that of the Commander Islands fur-seals that the two are readily distinguished by experts, and have very different values, the former commanding much higher prices than the latter at the regular London sales.

4. The old breeding males of the Pribilof herd are not known to range much south of the Aleutian Islands, but the females and young appear along the American coast as far south as northern California. Returning, the herds of females move northward along the coasts of Oregon, Washington, and British Columbia in January, February, and March, occurring at varying distances from shore. Following the Alaska coast northward and westward they leave the North Pacific Ocean in June, traverse the eastern passes in the Aleutian chain, and proceed at once to the Pribilof Islands.

5. The old (breeding) males reach the islands much earlier, the first coming the last week in April or early in May. They at once land and take stands on the rookeries, where they await the arrival of the females. Each male (called a bull) selects a large rock on or near which he remains until August, unless driven off by stronger bulls, never leaving for a single instant night or day, and taking neither food nor water. Both before and for sometime after the arrival of the females (called cows) the bulls fight savagely among themselves for positions on the rookeries and for possession of the cows, and many are severely wounded. All the bulls are located by June 20.

6. The bachelor seals (holluschickie) begin to arrive early in May, and large numbers are on the hauling grounds by the end of May or first week of June.

They begin to leave the islands in November, but many remain into December or January, and sometimes into February.

7. The cows begin arriving early in June, and soon appear in large schools or droves, immense numbers taking their places on the rookeries each day between the middle and end of the month, the precise dates varying with the weather. They assemble about the old bulls in compact groups called harems.

The harems are complete early in July, at which time the breeding rookeries attain their maximum size and compactness.

8. The cows give birth to their young soon after taking their places on the harems in the latter part of June and in July, but a few are delayed until August. The period of gestation is between eleven and twelve months.

9. A single young is born in each instance. The young at birth are about equally divided as to sex.

10. The act of nursing is performed on land, never in the water. It is necessary, therefore, for the cows to remain at the islands until the young are weaned, which is not until they are four or five months old. Each mother knows her own pup and will not permit any other to nurse. This is the reason so many thousand pups starve to death on the rookeries when their mothers are killed at sea. We have repeatedly seen nursing cows come out of the water and search for their young, often traveling considerable distances and visiting group after group of pups before finding their own. On reaching an assemblage of pups, some of which are awake and others asleep, she rapidly moves about among them, sniffing at each, and then gallops off to the next. Those that are awake advance toward her with the evident purpose of nursing, but she repels them with a snarl and passes on. When she finds her own she fondles it a moment, turns partly over on her side so as to present her nipples, and it promptly begins to suck. In one instance we saw a mother carry her

species is so situated as to provide a suitable climate and food supply throughout the year such species do not migrate. This is the explanation of the fact that the Northern fur-seals are migrants, while the fur-seals of tropical and warm temperate latitudes do not migrate.

pup back a distance of fifteen meters (fifty feet) before allowing it to nurse. It is said that the cows sometimes recognize their young by their cry, a sort of bleat.

11. Soon after birth the pups move away from the harems and huddle together in small groups, called "pods", along the borders of the breeding rookeries and at some distance from the water. The small groups, gradually unite to form larger groups, which move slowly down to the water's edge. When six or eight weeks old the pups begin to learn to swim. Not only are the young not born at sea, but if soon after birth they are washed into the sea they are drowned.

12. The fur-seal is polygamous, and the male is at least five times as large as the female. As a rule each male serves about fifteen or twenty females, but in some cases as many as fifty or more.

13. The act of copulation takes place on land, and lasts from five to ten minutes. Most of the cows are served by the middle of July, or soon after the birth of their pups. They then take the water, and come and go for food while nursing.

14. Many young bulls succeed in securing a few cows behind or away from the breeding harems, particularly late in the season (after the middle of July, at which time the regular harems begin to break up). It is almost certain that many, if not most, of the young cows are served for the first time by these young bulls, either on the hauling grounds or along the water front.

These bulls may be distinguished at a glance from those on the regular harems by the circumstance that they are fat and in excellent condition, while those that have fasted for three months on the breeding rookeries are much emaciated and exhausted. The young bulls, even when they have succeeded in capturing a number of cows, can be driven from their stands with little difficulty, while (as is well known) the old bulls on the harems will die in their tracks rather than leave.

15. The cows are believed to take the bull first when two years old, and deliver their first pup when three years old.

16. Bulls first take stands on the breeding rookeries when six or seven years old. Before this they are not powerful enough to fight the older bulls for positions on the harems.

17. Cows when nursing regularly travel long distances to feed. They are frequently found one hundred or one hundred and fifty miles from the islands, and sometimes at greater distances.

18. The food of the fur-seal consists of fish, squids, crustaceans, and probably other forms of marine life also. (See Appendix E.)

19. The great majority of cows, pups, and such of the breeding bulls as have not already gone, leave the islands about the middle of November, the date varying considerably with the season.

20. Part of the non-breeding male seals (holluschickie), together with a few old bulls, remain until January, and in rare instances until February, or even later.

21. The fur-seal as a species is present at the Pribilof Islands eight or nine months of the year, or from two-thirds to three-fourths of the time, and in mild winters sometimes during the entire year. The breeding bulls arrive earliest and remain continuously on the islands about four months; the breeding cows remain about six months, and part of the non-breeding male seals about eight or nine months, and sometimes throughout the entire year.

22. During the northward migration, as has been stated, the last of the body or herd of furseals leave the North Pacific and enter Behring Sea in

the latter part of June. A few scattered individuals, however, are seen during the summer at various points along the Northwest Coast; these are probably seals that were so badly wounded by pelagic sealers that they could not travel with the rest of the herd to the Pribilof Islands. It has been alleged that young furseals have been found in early summer on several occasions along the coasts of British Columbia and southeastern Alaska. While no authentic case of the kind has come to our notice, it would be expected from the large number of cows that are wounded each winter and spring along these coasts and are thereby rendered unable to reach the breeding rookeries and must perforce give birth to their young — perhaps prematurely — wherever they may be at the time.

23. The reason the Northern fur-seal inhabits the Pribilof Islands to the exclusion of all other islands and coasts is that it here finds the climatic and physical conditions necessary to its life wants. This species requires a uniformly low temperature and overcast sky and a foggy atmosphere to prevent the sun's rays from injuring it during the long summer season when it remains upon the rookeries. It requires also rocky beaches on which to bring forth its young. No islands to the northward or southward of the Pribilof Islands, with the possible exception of limited areas on the Aleutian chain, are known to possess the requisite combination of climate and physical conditions.

All statements to the effect that fur-seals of this species formerly bred on the coasts and islands of California and Mexico are erroneous, the seals remaining there belonging to widely different species.

Their migrations as described in this report are roughly represented on this map (*indicating on map*). When they leave the Pribilof Islands in the autumn to go on their Southern migration they take this general course (*indicating*) to the coast of California and, comparatively speaking, widely disperse; on their return, following a course nearer the shore they pass through the Eastern passes of the Aleutian chain back to the Pribilof Islands (*indicating on map*).

The President. You mentioned that they pass nearer the coast on their return. Do you mean that they follow the territorial waters?

Mr. Carter. Do you mean by "territorial waters" within three miles of the shore?

The President. Yes.

Mr. Carter. I believe never. Scattered seals may occasionally go in, but as a herd, never, I think, so near the shore as that. When they go through the passes of the Aleutian Chain — those narrow passes — very likely they pass within that distance of the shore.

Senator Morgan. I think, Mr. Carter, there is some testimony to show the fur-seals sometimes have entered and been captured in the Straits of San Juan de Fuca.

Mr. Carter. Oh yes; there is a great deal of suggestion here and there, In the Case and Counter Case of Great Britain evidence

of a conjectural character, that seals visit *this* place, and haul out at *that* place, and breed on *other* places than the Pribilof Islands; but I am taking now, as correctly representing the facts as established by the evidence, the report, the views, of the American Commissioners. I feel tolerably certain that when their report comes to be compared with the evidence, and when all the evidence is thoroughly sifted, it will be found that their statement will stand in the main as a truthful and accurate account.

Senator Morgan. Is their statement based upon the same evidence that this Tribunal has to consider, or is it based upon facts which have come to their knowledge as experts?

Mr. Carter. Upon both sorts of evidence. Their statements have the character of evidence. They were appointed for the purpose of giving their opinions upon these questions and their opinions, from whatever sources derived, are therefore evidence of the facts which they state. They are original evidence of the fact which need not be further substantiated. At the same time they are substantiated by the great weight as we think — the overwhelming weight — of the testimony which is before this Tribunal.

Senator Morgan. Suppose the same effect is conceded to the report of the Commissioners on behalf of Great Britain?

Mr. Carter. I have had occasion already to observe that so far as the opinions of those commissioners go as to facts, so far as their statements purported to be based upon other observations than their own, I have submitted grounds and reasons which lead me to the belief and I think will lead the Tribunal, or should lead the Tribunal, to the belief that those statements are not to be taken where they conflict with the statements of the American Commissioners.

The President. Do you take the opinions of the American Commissioners as evidence?

Mr. Carter. I do.

The President. And you reject the British opinions as evidence?

Mr. Carter. I do, in general; and that for the reasons stated, that the opinions of the American Commissioners have been formed in pursuance of the duties imposed upon them by the terms of the treaty, in accordance with that conception of their functions which is contained in the treaty; and the views of the British Commissioners are based upon a different conception.

That is all I purpose to read at present from this report. It gives a general description of the nature and habits of this animal, the conditions of seal life upon the islands and the facts attending the migrations of the seal.

There are some further matters of fact in addition to these which I desire to lay before the Arbitrators, and for this purpose I read some statements in our argument which we conceive to be clearly established.

First. In addition to the climatic and physical conditions above enumerated as necessary to render any place suitable for a breeding ground for the seals, exemption from hostile attack or molestation by man, or other terrestrial enemies, should be included. The defenceless condition of these animals upon the land renders this security indispensable. If no terrestrial spot could be found possessing the favorable climate and physical requirements above mentioned, and which was not at the same time exempt from the unregulated and indiscriminate hostility of man, the race would speedily pass away.

Second. The mere presence of man upon the breeding places does not repel the seals, nor operate unfavorably upon the work of reproduction. On the contrary, presence and the protection which he alone is capable of affording, by keeping off marauders, are absolutely necessary to the preservation of the species in any considerable numbers.

That statement is, of course, substantiated by what we know respecting the numbers of seals of similar character in the South Seas. In former periods they existed in great multitudes. Not however being protected upon the breeding places by man they were visited by vessels fitted out for their capture and were very speedily destroyed.

Third. If man invites the seals to come upon their chosen resorts, abstains from slaughtering them as they arrive, and cherishes the breeding animals during their sojourn, they will as confidently submit themselves to his power as domestic animals are wont to do. It then becomes entirely practicable to select and separate from the herd for slaughter such a number of non-breeding animals as may be safely taken without encroaching upon the permanent stock.

That statement, if disputed would be abundantly proved by the evidence. We know, of course, from the experience upon these islands that the mere presence of man does not repel the seals at all. They come up and land upon those islands with perfect confidence that they will not be disturbed. After they arrive there it is entirely possible for man to separate from the herd the non-breeding males. They do not intermingle with the breeding animals. The old bulls drive them away immediately. It is not until the age of six or seven years that they are fit for service, or called upon to render service upon the rookeries. And until they arrive at that age they haul out, as it is called, by themselves, in places behind the rookeries, or upon sandy beaches away from them. While thus hauled out by themselves these young males are, of course, separated from the rest of the herd, and they can be driven from the places where they are to a conven-

ient place for slaughter, without working any disturbance to the breeding rookeries.

Fourth. If the herd were exempt from any depredation by man, its numbers would reach a point of equilibrium at which the deficiency of food, or other permanent conditions, would prevent a further increase. At this point, the animal being of a *polygamous* nature, an annual draft from non-breeding males might be made by man of 100,000 — perhaps a larger number — without causing any appreciable permanent diminution of the herd.

The fact that is there stated that if this animal were not disturbed at all by man, the numbers of the herd would eventually reach a maximum at which they would remain is more fully stated, explained and justified by the American Commissioners in their report. It is, I suppose, a perfectly familiar conclusion to all naturalists that all races of animals, if undisturbed by man, have a tendency to increase, up to a certain maximum. They are subject to the attacks of enemies other than man; and there are certain causes at all times operating upon them which would eventually prevent their increase beyond a certain amount. If this were not so of course the animal races would fill the seas eventually. In the case of the fur-seals they do have enemies other than man. We do not know what all their enemies are. Their greatest marine enemy is known. It is the killer whale, which follows these herds, makes its attack upon them, and doubtless kills a great many. How many of those that are born each year are thus killed by their natural marine enemies there is, of course, no means of determining.

The President. Is that killer whale hunted and destroyed by man?

Mr. Carter. No; I do not think it is. I never heard that it was.

The President. It is not an object of whaling?

Senator Morgan. I think that it is the one which yields oil and whalebone; and, of course, if it is, it is hunted by man assiduously.

Mr. Carter. It may be true; but I have never heard myself that the killer whale was hunted by man. Its means of escape are too great.

Lord Hannen. Is it really a whale?

Mr. Carter. It is suggested to me that the killer whale is a small whale, and not taken either for its bone, or its oil. That I shall venture to state as our view of the fact, so far as that is important.

The President. In point of fact, the protection by man of the seals does not go to the extent of taking this killer whale for the sake of preserving the seal herds?

Mr. Carter. No; man does not extend his protection to the herd in that direction.

If this herd of seals were left to its natural enemies, I have said it would increase to a certain maximum point, which point would be determined by the operation of various causes. Sufficiency of food would be one. That would furnish a natural limit to the increase of the herd. Another limit to the increase of the herd, or another circumstance that would operate to limit the increase of the herd if left to natural conditions, is the contests among the males themselves for the possession of females. Of course, as presumably there is an equal number of males and females born each year, and as the animal is in a high degree polygamous, one male answering for anywhere from twenty to forty or fifty females, there are fierce conflicts between the males for gaining possession of the females, and gaining places on these rookeries. Those contests are very deadly, and result disadvantageously upon seal life upon the rookeries in different ways. It leads to the slaughter of a great many males; and it interferes very greatly with the process of reproduction during the season of reproduction. The way in which these contests between the males operate to reduce the numbers of the herd, is evidenced in various other classes of highly polygamous animals; for instance, buffalo — the American bison, now nearly extinct. That was a highly polygamous animal; and the extent to which the males were disabled and killed by conflicts with each other was very great. I believe the same thing is true of all other animals which are highly polygamous, with deer, and elk, and moose and such animals.

The President. Are the bodies of those animals that are killed by one another picked up for the use of their furs?

Mr. Carter. No; I apprehend not.

The President. There are quite lost.

Mr. Carter. They are lost. The breeding rookeries are left undisturbed, as far as possible. They cannot be recovered without going among the rookeries for the purpose of taking them. When the supply of males is not excessive, of course the conflicts are not so frequent in number, and not so fierce and deadly in character.

Take this herd of seals when it has reached its maximum under conditions where it is not disturbed by man. If man appears upon the scene, and makes a draft upon it, he can take a certain number without affecting the normal numbers of the herd. That arises from the circumstance that the animal is polygamous in its character. If he takes no females, but confines his draft to males, and leaves enough males for the service of the whole herd, he does not touch the birth rate of the herd. Consequently there continues still to be as many born as before, and the herd would pre-

serve its numbers at that maximum point, suffering a slight diminution at first by the number of males that are taken.

The President. Do you mean to say that would be a sort of peacemaking, and consequently a sort of taming the animals, changing their modes of life and a domestication?

Mr. Carter. No; I do not mean that, in that sense.

The President. If you suppress the occasions of fighting between them, of course you make them tamer.

Mr. Carter. You do not suppress them. You affect them to a slight degree, but not to a sufficient degree to make any appreciable difference. You still leave a large number. You still leave a superfluous number. They are still abundant after you have made your draft from them.

The President. That is one of the modes of man, of going among these animals and domesticating them.

Mr. Carter. It is what I call husbandry. I do not go so far as to assert that it makes a substantial change in their nature. I only assert the fact that you can take a very large number from them without in any degree diminishing the normal numbers of the herd. You diminish it at first, of course. If you have a herd of five millions, male and female, and take a hundred thousand of them, you diminish the herd at first by that 100 000; but you will soon reduce the size of the herd to a number, below which this annual draft of 100 000 — that particular number I assume — will not carry it. They continue the same. Of course it is the same with seals as it is with any other polygamous animal, the same as it is with sheep or horses or cows. You can take a certain number of males without in any degree diminishing the numbers of the herd. It is a matter, not of scientific knowledge; it is a matter not for abstruse investigation. It is a matter of common barnyard observation. That is all it is.

I have stated as a fact which I suppose to be capable of substantiation that, taking this particular herd of seals, you can make a draft upon it of 100 000 young males without any danger to the stock, and without diminishing the normal numbers of the herd. What is the evidence upon which that statement can be supported? Of course experience must alone determine the question of how many you can take; because we do not know what the number is of the different sexes on the island. We do not know how many males there are, and we do not know how many females there are. We do not know how many are destroyed annually. We have no knowledge of that sort to appeal to; and of course we must rely on experience alone. But we have a very long experience.

The President. Are the seals counted on the islands?

Mr. Carter. No.

The President. No one knows their numbers?

Mr. Carter. Oh no; attempts have been made to estimate their numbers in ways like these. Those occupying a space, say, 100 feet square would be counted, and then the whole area would be ascertained and upon the assumption that each 100 feet contained as many, a computation would be made; but all accounts now agree that all the methods now relied upon for the purpose of determining what the precise number there is are only misleading. You can say there are more than a million; but whether there are two, or three or four or five millions, no man knows or can know. Conjectures have been made, and the fact has been stated by observers, based upon conjecture, and those statements have received a certain degree of credence; but the result of the evidence is that it is impossible to tell with any approach even to precision, what the numbers are; and that the failure to reach accuracy is so complete that it is best not to rely upon any attempts.

The President. As a matter of fact, the herdsman does not know much of his herd, except as to killing part of the increase?

Mr. Carter. He does not know how many there are; that is very certain. He knows, however, that there are a great many there. I have said that a draft of 100 000, can be made from this particular herd. The evidence of that is this.

The Russians discovered those islands in 1786 or 1787. They did not know, or if they did know, paid no attention to, the laws of nature in reference to the increase of these animals and the decrease of them; and they made indiscriminate drafts upon them, taking both males and females. They were governed probably by the consideration of the state of the market — how many the market would take profitably. Of course it would not do to throw a very great many upon the market, because that would not be profitable. But this sort of indiscriminate attack upon them very soon greatly reduced the numbers of the herd. They then found themselves compelled to take notice of the fact that the animal was polygamous, and that it was only by the exercise of care, and by attending to natural laws, that they could preserve this valuable race. They then began to confine their drafts to young males; and finally established a system under which the draft was wholly limited to young males; and that system was fully and perfectly established somewhere about 1846.

The President. That system was not yet fully established under the Russian Ukase of 1799?

Mr. Carter. No; it was not.

The President. Nor even during the greater part of the second Ukase of 1821?

Mr. Carter. No; not perfectly, it was not.

The President. But it was established in the Russian time before the American possession?

Mr. Carter. Oh, fully established for twenty years before the Americans took possession of it. The Russians confined their drafts of young males to various numbers, ranging from thirty to forty thousand, or thereabouts. Those were their annual drafts.

The President. And females were never slaughtered then before pelagic sealing was observed?

Mr. Carter. Oh no; not after this system was fully established by Russia — not after that.

The President. What became of the females?

Mr. Carter. They lived their natural lives and died, subject to such attacks as their natural enemies made upon them.

The President. They were never taken for their skins?

Mr. Carter. They were never taken. Of course a female might be taken without damage if she had completed her period of reproductive usefulness and become barren; but that is a fact that cannot be ascertained; so they were never taken. The drafts were confined, as I have said, to something like thirty to forty thousand. Under that system, taking no larger number than that, the numbers of the herd greatly increased and toward the close of the Russian occupation, the size of the drafts were increased much over thirty or forty thousand, sometimes going as high as fifty to seventy five thousand.

Senator Morgan. Were those drafts from the herd always regulated by the Russian Government before the United States got possession of it?

Mr. Carter. They were regulated by the company which had control of the islands. That company fixed upon a number which would be taken each year, and directed the slaughter to be confined to that number.

Senator Morgan. That was by authority?

Mr. Carter. By the authority of the company; not by the authority of the Russian Government, so far as I am aware.

Senator Morgan. Still it operated as a rule of action, a law.

Mr. Carter. A perfect rule of action to those on the Islands. Toward the close of the Russian occupation, as I have said, larger drafts were made, from 50 to 75 thousand; and yet, notwithstanding those drafts at the time the islands passed into the possession of the United States in 1867, the herds were probably larger than they had been before during a knowledge of them by man; so that it is easily inferable from this that a larger draft even than a number varying from 50 to 75 thousand annually might be taken.

When they passed into the control of the United States, and

during the year 1868, there was no regular authority established upon the islands, and consequently the islands were open to predatory excursions of all sorts, expeditions, and vessels, went there and made raids upon the islands, if raids they could be called. There was nobody there to prevent them from going, and they took an enormous number.

The President. The Russian lessees had no more power?

Mr. Carter. The Russians had no authority to prevent it. The United States Government had established no authority.

The President. Was the Russian company dissolved by the very fact —

Mr. Carter. No; but it had no longer any title to the breeding places.

The President. And no American company had been formed?

Mr. Carter. No; no new American company had been formed? and the United States Government had established no authority over them. So there was a period of lawlessness there. Anyone could do as he pleased. There was a sort of interregnum so to speak. That was availed of by many persons who made an indiscriminate attack — or to some extent indiscriminate — upon the seals. In the first year they took in numbers about 240,000.

Mr. Justice Harlan. What year was that?

Mr. Carter. 1868. They tried to confine themselves, even then, to the taking of males; and they were greatly aided in that effort, and the seals were greatly spared, by the natural aversion which the natives who did the driving had acquired against killing a female. The establishment of the system and its long maintenance upon the island, of saving the females, its obvious benefits and utilities, its manifest necessity to a preservation of the herd, had so habituated the natives to it that they had acquired an aversion to the killing of females; and that aversion had a beneficial effect even during this period of unregulated capture. Still, it is not improbable, and there is some evidence to show, that there were perhaps thirty or forty thousand females taken at that time. Subsequently to that the United States established its authority, leased the property to a company by a lease, one of the regulations of which gave the United States power to control the number that should be taken annually; and under that the lessees from the first began to take 100,000 young males a year.

The President. Can the Government fix the number every year?

Mr. Carter. Every year.

The President. And alter the number every year?

Mr. Carter. Alter the number.

The President. Without owing any indemnity to the company?

Mr. Carter. Absolutely at its own pleasure; and it has agents, superintendents, there, for the purpose of observing the condition of the herd in order to enable it to exercise that discretion the more wisely.

I may say further in reference to the slaughter of females, and to the protections against it, the United States upon acquiring the sovereignty over the islands, passed laws making it a penal offence to kill any female. It was a penal offence to kill any seal at all without its authority, but a penal offence to kill any female under any circumstances. It began, as I say, by taking 100,000 a year.

The President. Is that written down in the grant also, that they are not to kill females?

Mr. Carter. I cannot say.

The President. No other person has authority to kill a seal, you just said. There are laws against the killing of seals. Then if the only ones who have authority to kill a seal are the company, then the company must be interdicted from killing females?

Mr. Carter. It is interdicted by law — the law of the United States. A statute of the United States binds even the action of the executive government. The executive government of the United States could not give authority to kill a female seal. It is a crime.

Mr. Justice Harlan. Mr. Carter, some of the Arbitrators want to know whether the concession granted to this company was granted by the executive department under the authority of an act of Congress?

Mr. Carter. It was. There was a special act of Congress providing that the islands might be leased out and provision made for putting the privilege up at auction and obtaining the highest bidder; and the lease was executed in pursuance of those provisions. The government was compensated in two forms; first, by a gross sum paid annually and then by a royalty upon each seal killed.

Lord Hannen. It was only the source of the lease that we wanted to get at — whether it was under the direct power of an act of parliament, or whether it was done by the executive.

Mr. Carter. It was done by the executive department of the government under the authority and in the discharge of its duties imposed upon it by the act of Congress.

The President. By a special act of Congress?

Mr. Carter. By a special act of Congress.

The President. Not made for this company, but made for the leasing?

Mr. Carter. Oh no; not made for this company.

Mr. Justice Harlan. In Section 4 of the Act of Congress of July 1st, 1870, it is provided " That the Secretary of the Treasury shall lease for the rental mentioned in section of this act " the privilege of taking seals on these islands.

The President. The act of leasing to such company was the mere action of the executive.

Mr. Justice Harlan. Under the authority of the act of Congress.

[The Tribunal thereupon took a recess.]

[The Court resumed at 2.15 p. m.]

Mr. Carter. When the Tribunal rose for its recess I was stating that, as a matter of fact, it is possible to take 100,000 young males from the herd without diminishing its normal number.

Mr. Justice Harlan. Are you speaking of the present time or a previous period?

Mr. Carter. I was taking the herd at its maximum amount ; that is, I assume that if man withholds his hand the herd will reach a certain maximum beyond which it will not go if left to exclusively natural causes. If man interferes and confines his draft to the young males he may take 100 000 annually without diminishing the normal numbers of the herd. The first draft will of course diminish the number by the number taken ; but after the first few years the normal number will remain the same. I had stated, as supporting that view, that drafts to the extent of from fifty to seventy-five thousand had been taken under Russian occupation, and the herd had increased from a depressed condition, so that at the time when it passed into the hands of the American Government its number were as large if not larger than ever. I had spoken of the irregular and indiscriminate drafts of 1868, when 240 000 were taken in one year. When the United States came into possession its lessees began by taking 100 000 annually, and they continued to take that number annually until 1887 — a period of seventeen years. It was not until 1884 that any real diminution in the size of the herd was observed. Now let us see what fortunes the herd had been subjected to in the course of that period of seventeen years. This inquiry introduces me to the subject of pelagic sealing and the attack which was thus made upon the seals by man. If the members of the Tribunal will turn to page 366 of the Case of the United States (Report), they will there see the amounts of the draft proceeding from this kind of attack del by the hand of man,

and that is by pelagic sealing. The practice of pelagic sealing began in 1872. Now, speaking of pelagic sealing, I do not mean that kind of pelagic sealing that had been carried on always by the Indians on the coast; I class that kind of pelagic sealing with the causes of diminution which proceed from natural enemies of the seal other than the acts of man. The herd had assumed a normal maximum with that element prior to the time which I am taking into consideration began. Pelagic sealing increased from to year, year as indicated by the table of figures which I now read :

The number of seal skins actually recorded as sold as a result of pelagic sealing is shown in the following table :*

Year.	No. of skins.	Year.	No. of skins.
1872.	1,029	1882.	17,700
1873.	—	1883.	9,193
1874.	4,949	1884.	* 14,000
1875.	1,646	1885.	13,000
1876.	2,042	1886.	38,907
1877.	5,700	1887.	33,800
1878.	9,593	1888.	37,789
1879.	12,500	1889.	40,998
1880.	13,600	1890.	48,519
1881.	13,541	1891.	62,500

* Number estimated from value given.

Now, during a period of more than ten years, this draft of 100 000 young males was made by the United States upon this herd without any substantial diminution of its number. The contrary of that will be asserted; at least that proposition will not be admitted to the extent to which I have stated it here. So far as the evidence is dealt with on that subject on the part of the United States, it will be dealt with by Mr. Coudert, I have not the time to go through the evidence; nevertheless I shall state the main grounds upon which that statement is supported. The evidence showing, as the United States contends, that up to the year 1884 there was no substantial or perceptible diminution of the number is derived from the testimony of persons who were on the islands and who knew the facts. There is no evidence to the contrary substantially contradicting that. There are some vague and untrustworthy conjectures that a diminution had been observed prior to that time, but the substantial evidence, I think I am well justified in assuming, confirms the position which I now take; and that is, that for a period of ten years and more this draft of 100 000 was taken by the United States without any substantial diminution of the numbers of the herd. In 1884 it will be seen that pelagic sealing had assumed large proportions, the numbers taken in that year being 14 000, while in 1885 13 000 were taken in this man-

ner ; and, as I shall presently show to the Arbitrators, that number consisted in great part, if not entirely, of females. Of course this taking of females, operating, as it did, upon the birth-rate, was a fact of the most important character.

We do not pretend that the United States can continue to take 400,000 from that herd if pelagic sealing is permitted. If pelagic sealing is carried on to the extent of taking five or ten thousand annually it would be perfectly impossible for the United States to take that number of young males. My assertion is that if all other attacks by man are prevented, and if pelagic sealing is prohibited, it is possible for the United States to take 100,000 annually. And experience proves it. They did it for ten years and always without any diminution. In 1884, or perhaps a little later, it may have been in 1887, they began to find it difficult to obtain these 100,000 young males. They were not easily discoverable on the sealing grounds. Drives had to be made more and more frequently in order to procure that number, and difficulty was experienced in getting it. Prior to that time the same number was taken, and still there remained large numbers of the same class untouched. But when the ravages of pelagic sealing began to extend, then, the birth-rate being diminished, the young males were fewer in number. Still the drafts were continued — they ought not to have been — they were continued until 1890, when, in consequence of the difficulty of making the drafts and of the certainty which then became manifest that too large a draft was being taken from the herd, the taking was stopped when the number of 23,000 had been reached.

The President asked how this stoppage occurred.

Mr. Carter. This was done by order of the Government Agent representing the United States on the islands, who had charge of the fishery and was clothed with discretionary power to diminish the number when such a step was thought to be necessary. The time had arrived when he thought it was necessary to take a smaller number, and he stopped the killing when the number of 23,000 had been reached. But during the three years preceding that date more and more difficulty had been experienced in easily finding the 100,000 young males to be taken. Had due consideration been given to the subject of pelagic sealing, had full account been taken of the serious ravages which it made on the herd, it would have been the part of prudence to stop before that time. But the subject was new, the practice of pelagic sealing was new, and the matter did not challenge the attention of the authorities on the islands until it had reached considerable proportions. It was not until the year 1883 that pelagic sealers had ventured into Bering Sea. Up to that time they had only carried on their operations in

the North Pacific Ocean south of the Aleutian Islands. In that year sealers entered Bering Sea, and from that time onwards the practice gradually increased of entering Bering Sea. But I think it is quite clear that it is possible, if pelagic sealing were prohibited, to take 100,000 annually. Such a draft would not affect the regular normal increase of these animals so useful to mankind. That number and possibly a larger number may be taken, but I think the figure I have given is substantially correct. I think a larger draft could be made.

I quote from page 80 of my Argument. I now continue with our propositions of fact :

Fifth. Omitting from view, as being inconsiderable, such killing of seals as is carried on by Indians in small boats from the shore, there are two forms of capture at present pursued : That carried on under the authority of the United States upon the Pribilof Islands, and that carried on at sea by vessels with boats and other appliances.

Sixth. The killing at the Pribilof Islands if confined, as is entirely practicable, to a properly restricted number of non-breeding males, and if pelagic sealing is prohibited, does not involve any danger of the extermination of the herd, or of appreciable diminution in its normal numbers. It is far less expensive than any other mode of slaughter, and furnishes the skins to the markets of the world in the best condition.

That fact is of course incontestable. The expense of killing seals upon the land, where they may be put to death at the rate of 1000 daily, must be much less than where it is necessary to fit out vessels with appliances and send them on distant voyages. And it furnishes the seals to the markets in the best condition. The difference is indeed very substantial, for the sealskins from the Pribilof Islands are held at a much higher price. I proceed with the statement :

The killing at these islands, since the occupation by the United States, has been restricted in the manner above indicated. It has been the constant endeavor of the United States to carefully cherish the seals and to make no draft except from the normal and regular increase of the herd. If there has at any time been any failure in carrying out such intention, it has been from some failure to carry out instructions, or want of knowledge respecting the condition of the herd. The United States are under the unopposed influence of the strongest motive, that of self-interest, to so deal with the herd as to maintain its numbers at the highest possible point. The annual draft made at the islands since the occupation of the United States has been until a recent period about 100,000. This draft would be in no way excessive were it the only one made upon the herd by man.

Now I have said that if the killing by the United States has not been confined to this number, it is on account of some failure to carry out instructions at the islands, or from want of proper knowledge respecting the actual condition of the herd. The United

States lessees carry on their enterprise under the influence of the strongest possible motive that of self-interest. It is to their interest to prevent any diminution of the herd. Of course it is only the plainest of fools who kills the goose that lays the golden eggs. Here is a property the annual income of which is very large, and that annual income can be made permanent, but only on condition that the normal numbers of the herd are maintained. It is therefore the interest of the United States Government to prevent the taking of excessive drafts. It is a question of self-interest — of that interest which operates most strongly upon the minds of men. What is the interest of the United States is also the interest of the lessees themselves. The United States Government has adopted the policy of leasing out these islands for a long term — twenty years — and the lessees pay a considerable gross sum for the privilege. It is therefore to their interest to keep the herd at its highest remunerative strength. I proceed :

Seventh. Pelagic sealing has three inseparable incidents :

(1) The killing can not be confined to males; and such are the greater facilities for taking females that they comprise three-fourths of the whole catch.

(2) Many seals are killed, or fatally wounded, which are not recovered. At least one-fourth as many as are recovered are thus lost.

(3) A large proportion of the females killed are either heavy with young, or have nursing pups on the shore. The evidence upon these points is fully discussed in Appendix.

Eighth. Pelagic sealing is, therefore, by its nature, destructive of the stock. It cannot be carried on at all without encroaching *pro tanto* upon the normal numbers of the herd, and, if prosecuted to any considerable extent, will lead to such an extermination as will render the seal no longer a source of utility to man.

There can be no discrimination exercised in pelagic sealing. Every seal that is found is killed, and no distinction of sex can be observed; and, in point of fact, the amount of the catch is, as we maintain, three-fourths females. Now the evidence upon that point will be more fully discussed by my brother Coudert. I have time only to call the attention of the Tribunal to some leading features. In the first place, to what we should suppose to be true from the probabilities of the case. Here is a herd of seals — animals which from their nature are highly polygamous, insomuch that one male suffices to serve from twenty to forty females, and for a long series of years large drafts have been made upon the males. The females therefore greatly outnumber the males — perhaps three or four to one. Therefore the catch of females ought to outnumber the catch of males by three or four to one. Again while the seals are on their northerly migration the females are easily approached and more easily killed. Such are the probabilities; now what is the evidence as to the fact? The testimony given on

our side by a multitude of depositions proves that the catch of females is as much as eighty or ninety per cent, of the whole number taken. That evidence is derived from individuals engaged in pelagic sealing. In the next place we have the evidence of the furriers who handle the skins, and who can tell at a glance the difference between a male and female skin ; and their evidence tends to show that the proportion of females is very much greater than seventy-five per cent. Against this we have a very large number of conflicting affidavits — on the part of Great Britain, and 2 may allude to these affidavits. There are twenty-six witnesses whose depositions were given on the part of Great Britain who state that the catch of females is larger than that of males. Nineteen agreed that the proportion was sixty per cent, of females in the whole catch, one placing it as high as eighty per cent. There were thirty-five witnesses who said that the numbers were nearly the same. Thirty-eight stated generally that more males than females were taken ; and then there were thirty who stated that there were sometimes more females and sometimes more males.

And there were, as I have already said, nineteen who testified to sixty per cent. Now, putting all that together, it does not displace the superior evidence submitted on the part of the United States, fortified as it is by the probabilities of the case, that at least seventy-five per cent, of the catch is composed of females. In the next place, in pelagic sealing there are of course—it must be so — a great many seals fatally wounded which are not captured. Now the general purport of the evidence of the United States is to the effect that at least a quarter of the number of seals that are wounded and eventually killed are lost and not recovered. And the other fact which I have stated as an inseparable feature of pelagic sealing is that a large proportion of females are either heavy with young, or nursing mothers. Those killed on their migration north of the Pribilof Islands are heavy with young. They give birth to their young a day or two after landing. They appear to land only when forced to do so for the purpose of giving birth to the young. And these affidavits give sickening details which I do not think it proper to dwell upon now respecting the slaughter of females heavy with young. They are skinned upon the deck of the vessel, and the young drop out bleating and crying and remain in that condition ; sometimes for days. After giving birth to their young on the island the females are obliged to go out to sea in search of food, and they travel great distances, sometimes, it is said as far as a hundred and fifty miles. They have been found and killed at such a distance, and it was apparent from their condition that they had young on shore. The details of the killing of these nursing animals—mammals with distended breasts, are

sickening; but I do not dwell upon them here because I am only dealing with the material facts which I shall endeavor to bring to bear upon the question of property. Now this recital of the principal facts which it is needful to take into consideration in determining the question of property embraces the following propositions which I believe cannot be disputed by the other side:

1. The seal is a mammal, highly polyamous, but producing one only each year. Its rate of increase is, therefore, exceedingly slow.

2. It is defenceless against man on the land, and is easily found and captured at sea.

3. The present draft made upon the herd is not by a few barbarians to supply their immediate wants, but by civilized man to supply the eager demand of the whole world.

4. The race may be substantially exterminated by man by either form of attack, that the land, or that upon the sea.

Now as to the land, the possibility of extermination is admitted. The race can be exterminated by the United States. The seals are there, absolutely within the power of man, for five or six months of the year, and they could all be killed. And if any remained after an indiscriminate slaughter in one year they could be killed in the next. It would take but two or three years to exterminate the whole of them. So far as they constitute an ingredient of the commerce of the world and a bounty of nature useful to man, they could be absolutely exterminated by the United States if the United States chose to do such a thing. They can also be exterminated by pursuit at sea. That will not be admitted by the other side, but the members of the Tribunal will see that that point is beyond dispute. The learned counsel for Great Britain take the ground that this herd will not stand an annual draft of 100,000 young males—that that is destructive. Now we contend that it will stand a draft of that amount. There is of course a certain number of young males that may be taken, and we think it ranges as high as 100,000. If you go beyond that point you begin to destroy the herd, because you do not leave a sufficient number of males for reproduction. Our position is that the limit to which a draft may go is as high as 100,000. The position of Great Britain is that that is too great a draft, and they offer what they conceive to be evidence tending to show that this is so. They point to the limited draft which Russia made as being the safer number and they say that the herd began to diminish under the larger draft made by the United States before pelagic sealing began; well, according to them, the herd will not stand a draft of 100,000 young males annually. Then, if it will not, what draft of females will it stand? Why, under the system of pelagic sealing, that has already reached

between sixty and seventy thousand a year; and when we take into consideration the number killed but not recovered—

The President. Is the number killed by American vessels included?

Mr. Carter. On page 207 of the Report of the British Commissioners will be found such evidence as we have in the Case showing the catch of the United States vessels. I thought that was included in the pelagic catch contained in the tables of the American commissioners. But I am corrected in that particular, so that the table from which I read must be increased by the amount of the American catch, whatever it may be, in order to get the true figures. But the American catch cannot be easily determined.

Sir Charles Russell. I thought the figures at page 207 embraced all.

Mr. Carter. There is a difference, however, between the American and British Reports as to the amount of the catch of the Canadian pelagic sealers. The table contained in to the American Case Says the the catch was 62,500 in 1891, whilst the British Report says 68,000. But so far as these details are important, they will be dealt with by my brother Coudert when he comes to treat upon the evidence. The point to which I wish to draw the attention of the Arbitrators here, is that it is perfectly manifest that the race can be exterminated by pelagic sealing as well as by the sealing on land, because if it cannot stand a draft of 100,000 males it most certainly cannot stand a draft of 50,000 females annually. It could not stand a draft of 5,000 females, because the killing of the females operates upon the birth-rate and consequently upon the increase. I think it will be demonstrable upon the assumption favored by my learned friends on the other side that if it will not stand a draft of 100,000 males it will not stand a draft of 10,000 females. The race may be exterminated therefore as well by capture on the sea as by capture on the land.

Mr. Justice Harlan. What is the duration of life of these seals?

Mr. Carter. I take their productive life to be about eighteen years; that is, the female seal, according to the Report of the American Commissioners.

Mr. Justice Harlan. My recollection is that the average life of the seal is about fifteen years.

Mr. Carter. Now let me call the attention of the Tribunal to the striking difference between dealing with a herd of fur-seals like these, as regards keeping up their numbers, and dealing with polygamous domestic animals of any sort, such as horses, cattle, or fowls. They can be raised all over the surface of the globe; there is hardly a spot where they cannot be produced. If there is a great demand for them in the market the production of these animals will be

stimulated, and there is immediately a saving of females, and the numbers killed will be taken from the males. Consequently, there is an immense increase, and that increase can be carried on indefinitely. In reference to the females of domestic animals, there need be no rule against killing, because these animals can be multiplied to a perfectly indefinite extent. With the seals, however, the case is far different. There are only four places on the globe where this animal is produced, and the demand for sealskins far exceeds the supply; and the object is not only to preserve the present normal number, but to increase it. To do this there is no way except saving all the females. Every reason and motive in the world unite to condemn the slaughter of any single female unless she be barren; for you cannot destroy one without diminishing the race *pro tanto*. And these are the conditions to which we are confined, owing to the circumstance that there are only four places on the globe where these useful animals can be produced. We must accept the conditions and content yourself with them.

Now, having shown the difference between the sea animals and domestic animals of a polygamous character, I will proceed to speak of the difference between the seals and wild animals, such as birds of the air, wild ducks, fishes of the sea, mackerel, herring and all those fishes which constitute food for man and upon which he makes prodigious attacks.

There you cannot confine yourself to the annual increase. You do not know it; you cannot separate it from the stock; you cannot tell male from female, and you do not know whether there are any more males than females. There is no reason why, in making drafts, you should make them from males rather than females. Therefore you cannot practise any kind of husbandry in reference to wild animals of the description I have mentioned. That is one of the distinguishing characteristics of these seals as compared with other animals over which man has no control. With the seal, man, if he does his duty, and accommodates himself to the law of nature, can practise a husbandry and obtain the whole benefit which the animal is capable of affording without diminishing the stock; but with other wild animals, such as ducks, fishes, wild game, he can practise no such husbandry at all.

And here it will be observed how Nature seems to take notice of the impotence of man and furnishes means of perpetuating the species of the wild animals last mentioned. In the first place, she makes provision for the production of prodigious numbers. Take the herring, the mackerel, the cod; they do not produce one only at a birth but a million! They produce enough, not only to supply all the wants of man, but the wants of other races of fishes that feed upon them. They inhabit the illimitable regions of the sea; their

sources of food are illimitable, and their productive powers are illimitable also, and therefore man can make such drafts upon them as he pleases without working any destruction of them. There is another mode designed by nature for their preservation, and that is the facility which she gives them to escape capture. Man lays hold of some of them which come within his range, but the great body of them never come there. With the seals it is otherwise. They have no defence. They are obliged to spend five months of the year on the land where man can slaughter them; and even at sea they cannot escape him, as the evidence clearly proves. The distinction between the seals and the domestic polygamous animals and other wild animals is extremely important and worthy of careful observation because of its bearing upon this question of property.

Marquis Visconti-Venosta. Do you know any other animals beside the seal that are situate in like conditions?

Mr. Carter. None under precisely the same conditions. I hear my learned friend whisper "sea-otter"; but you cannot practise any sort of husbandry with the sea-otter. And yet, such is the value of the sea-otter, that man has almost exterminated that animal.

The President. They are not protected.

Mr. Carter. They are protected by the laws of the United States; they are a part of the wealth of the Northern Sea. They were formerly the principal element of value in those northern seas; and the value attached to the skin of this animal was very great even when it was found in larger numbers.

The President. You will not put the sea-otter on the same legal footing as you do the fur-seal?

Mr. Carter. No. So far as I am aware, man has no sure means of preserving the sea-otter, for it seem to me that he has exterminated it almost altogether. Then take the case of the canvas-back duck, a bird which abounded in America. As long as man made but a slight attack upon its numbers — fifty years ago, when there were no railroads and when the means of transporting it were quite imperfect — this bird was found in great plenty, but it was confined to the locality where it was found. But now it can be transported five thousand miles without injury, and the whole world makes an attack upon it. The law may protect it a little, but it cannot protect it altogether from the cupidity of man; and this creature too, is fast disappearing.

In other words, these birds have all the characteristics of wild animals, and none of the characteristics of tame animals. You cannot practice any husbandry in regard to them. No man and no nation, can say to the rest of the world that he has a mode of

dealing with them which will enable him to take the annual increase without destroying the stock. I shall make use of that hereafter ; and you see now the important bearing it has. No man and no nation can say with regard to the fish in the sea that they can protect them. If they are in danger of destruction, they cannot say " We can enforce by our power a limitation of the annual draft to the annual increase. " There may be some fish as to which that may perhaps be said. When a more accurate knowledge is had of the habits of fishes, it may come to be ascertained that the inhabitants of some shores can protect some races of fishes which resort to that shore, provided other persons are required to keep their hands off.

The President. And that would give a right of appropriation, in your view?

Mr. Carter. Yes; that would tend that way. If they could, and no one else could. That would be the tendency of my argument. I am glad to see that the learned President catches it.

The consequence of the proved facts is that the fur-seal cannot maintain itself against unrestricted human attack. It cannot do it. That is admitted here. We have a joint report by all these Commissioners which is to the effect that the fur-seal is at present in the process of extermination, and that is in consequence of the hand of man. The treaty itself under which you are sitting admits it; for it admits the necessity of regulations designed to prevent extermination. The cause of this diminution, the grounds and reasons which are working the extermination of the seal are disputed between us. My learned friends upon the other side say it is this taking of the seals on the islands that is, in part, causing it. We say it is the pursuit of them by pelagic sealers; but, whatever the causes, there is no dispute between us as to the fact. These seals are being exterminated; and that means that the race cannot maintain itself against the hand of man unless the assaults of man are in some manner restricted and regulated. As I have already shown, this consequence of the inability of the race to maintain itself is inseparable from the killing of females. That race cannot maintain itself unless the slaughter of females is prohibited. It is a mammal, producing one at a birth. The rate of increase is extremely slow, and that increase can be cut down by a very small annual killing of the mothers from whom the offspring is produced. This inability of the race, this infirmity of the race to hold its own in presence of the enormous temptation to slaughter which is held out to man, is inseparable from the slaughter of females. The killing of males, if it were excessive, would produce the same effect. No doubt about that. We do not dispute,

or deny, that. All we say is that you can carry the killing of males to a certain point without any injury whatever.

The President. Mr. Carter, may I beg to ask you a question?

Mr. Carter. Certainly.

The President. The American Company, the lessees of the Pribilof Islands, consider the fur-seals as their property, or the property which they are to dispose of, according to the grant by the United States. If they consider that they have a direct right to these animals do you not think they have reason to complain that the United States allowed pelagic fishing by some of their fishermen on the American coasts, and can you state, as a matter of fact, whether the Company, or the lessees, have applied to the United States Government to make an enactment to prevent that fishing, that pelagic sealing, according to the right which has been given to them. If I understand well your purport, and if your purport is the same as the lessees or the American Company, it is an injury to them that pelagic sealing should be carried on and practical destruction of female seals be carried on by American fishermen. Do you not think that they have a right to complain, and I inquire whether they ever did complain to the American Government since 1884 for instance, which is the date you state as being the initial date when they began to perceive that pelagic sealing was offensive to their rights.

Mr. Carter. I think the lessees of the islands would have a moral right to complain to the United States if the United States, having leased these islands to them under certain conditions, allowed their own citizens to carry on pelagic sealing, or any other form of destruction. They would have a moral right undoubtedly to complain and a very strong equity to complain; but under the circumstances they have not, for the very first thing the United States Government did was to pass laws against it.

The President. On the islands?

Mr. Carter. Oh no; on waters as well.

The President. In the adjacent waters. It did not pass laws against American fishermen doing it elsewhere?

Mr. Carter. But the United States Government exercised all the power which Congress at the time supposed it had to prevent pelagic sealing. It supposed that in prohibiting pelagic sealing over the waters of Alaska — that is the phrase used — it embraced all those waters which it had acquired from Russia by the cession. The western boundary was that line which is seen drawn down there (*indicating on map*).

The President. That is not the question.

Mr. Carter. They, Congress, assumed that "all the waters of Alaska" embrace all that portion of Bering Sea, and that, therefore,

their enactments prohibit pelagic sealing over all those waters; and the United States Executive Government has so considered those enactments. It does seize whenever it can, and exercises its utmost diligence in seizing any American vessel caught anywhere in these waters engaged in pelagic sealing.

Mr. Foster. And always condemns them.

The President. That is not quite my question. My question is, does the American Company contend, as I understand you to contend, that the owners whoever they be, of the Pribilof herd, have a right of property or protection in these animals wherever they be; and if they have the right of property and protection, have they any legal right as well as moral right to complain of the United States not punishing pelagic sealing anywhere else wherever the seals may go; for if I understand your purport they have a right of property or protection any where — not only in Alaskan waters.

Mr. Carter. I agree to your suggestion that the lessees of these islands would have a moral right.

The President. No; I ask you whether they have a legal right?

Mr. Carter. Not quite a legal right, perhaps, because at the time when their lease was executed and their rights were acquired it might be said to be the fair interpretation of that document that they took their right to the furseals subject to the existing condition of things and that if there was any failure on the part of the United States to repress pelagic sealing they took it subject to that failure. I should, therefore, not consider that they have what is called a legal right; but I should think at the same time they had a moral ground to say to the United States: "You are the owners of this herd, and being the owners of the herd, and being a nation, you have a right to protect them wherever that herd goes. Having that right and having let the privilege of taking these seals on the Pribilof Islands to us, we think that you are bound — bound in the exercise of your just powers — to repress this pelagic sealing." I think they would have a right to insist upon that.

The President. I would call that a legal right.

Mr. Carter. No; I do not quite consider it a perfect legal right because it might be said to these people: "No, we have never undertaken to protect this herd everywhere on the seas. We executed to you this lease. You know what the laws were. You knew what protection you would get. You did not ask for anything more. Having accepted your lease under those circumstances you must be content with it."

The President. In fact they have not asked for any more. They have not asked for an act of Congress, a statute against American pelagic sealing.

Mr. Carter. I cannot speak upon that point. I know of no evidence in the Case.

Mr. Phelps. They have.

Senator Morgan. I would like to say, Mr. Carter, in that connection that the number of seals that are permitted to the lessees to be taken is regulated by the lease and by the law. Under the lease of 1870 they were permitted to take not exceeding 100,000 seals annually which number might be reduced by the Government of the United States without any liability whatever for damages, according to their estimate and opinion as to what public policy required. Under the lease of 1890 they were allowed to take not exceeding 60,000 under the same conditions. So that what ever number the United States fixes annually or at any time of the year they choose to fix, it is the number that they may take and is the number they have agreed to abide by. They have no right to any greater number than the United States chooses to award to them. Therefore they cannot have any interest direct or indirect in the question whether we are preserving the seal herds or not if they get their number.

The President. They have no direct right to the average of the herd.

Senator Morgan. Not at all — not the slightest.

Mr. Carter. I should still be disposed to agree with the suggestion of the learned President even under those conditions.

Senator Morgan. That there would be a moral right?

Mr. Carter. That there would be a moral right.

Senator Morgan. I do not think so.

Mr. Carter. That there would be a moral right in the lessees to call upon the United States to exercise that authority to preserve this herd; for they might argue: If you did exercise that authority this herd would be in a condition in a few years to give us, instead of 60,000, a 100,000.

Senator Morgan. If you will allow me, the Congress of the United States which has but recently adjourned has made a provision of law by which all of the statutes that now apply to the Bering Sea shall be extended in their full force over any area of waters that might be determined by this Tribunal as being within the prohibition or within the regulations which they have prescribed. The Congress of the United States have prepared in advance so as to extend their penal and other laws over the area that this Tribunal is to determine upon. It has done all that can be done under the circumstances.

Sir Charles Russell. That was merely a provision to enable the United States to give legal effect to any regulations, if any, that should be enjoined by this Tribunal.

Senator Morgan. That was in the hope of a proper adjustment of this question.

Mr. Carter. It was a looking forward on the part of the United States to a concurrence in any measures which this Tribunal might adopt which would insure the preservation of the fur-seal.

The President. What I wanted to come to, if you will allow me to make my point a little more clear, is this : According to the 5th question of our article 6 we have to determine whether there is a right of property and protection in these seals. I think your contention is that there is a legal right of property and protection.

Mr. Carter. Yes; it is.

The President. That is for the United States; but you do not admit of a legal right or a moral right for the lessees of the United States to claim the right of property and protection. I think what Mr. Senator Morgan just explained accounts for that.

Mr. Carter. Yes.

The President. I wanted to make the distinction clear.

Mr. Carter. Yes; I apprehend. If these islands were not in the possession of the United States Government, but were in the possession of private individuals, I think there would be a moral right on the part of those individuals to call upon the United States Government to exercise its powers on the high seas to prevent the destruction of those seals.

The President. That is what the United States demand from us to day?

Mr. Carter. It is what the United States demand from you to day. It is what I am now endeavoring to show to this Tribunal. I am taking one step, and that is to say that the United States has a right of property here. My next step will be that having that right of property, they have a right to go there with force and protect it; and my next step will be that if they have not the right to go there with force and protect it, you ought to pass some regulation giving them that right.

The President. Then they do not protect their own property, — as yet, against the pelagic sealing.

Mr. Carter. They do not protect their own property as yet, for the reason that they do not want to disturb the peace of the world.

The President. Would it disturb the peace of the world if they were to act against their own citizens engaged in pelagic sealing?

Mr. Carter. No; not at all; and we continue to act against our own citizens.

The President. No, you do not do that. You do not act against your own citizens everywhere.

Mr. Carter. So far as our laws go.

The President. I say your laws do not go as far as your contention.

Mr. Carter. No; the laws do not go as far as our contention goes. The Congress of the United States is a different body from the executive department of the United States. The executive department of the United States submits questions of law, takes its position, here. I am here for the purpose of arguing them. Perhaps the Congress of the United States may not have gone through all the processes of reasoning which I have gone through. They act upon their own views and upon their own conclusions. They have taken the ground and have evinced their intention of protecting these fur-seals, and protecting them for their own benefit, against the attacks of pelagic sealing, from whatever quarter — their own citizens or others. They may have understood that their powers were confined to Bering Sea, and therefore limited their jurisdiction to the Bering Sea. They may have acted upon that assumption — an erroneous one, in my judgment.

Mr. Justice Harlan. The President refers to the failure of Congress to enact a statute forbidding American citizens from taking seals on the North Pacific. Supposing that Congress could pass such a law, and did, what effect would that have upon the pelagic sealing, if the subjects of Canada were left at liberty to pursue it?

The President. That is another question.

Mr. Carter. It would tend, possibly, to diminish the attacks, to some extent; how much, would be a question. Of course, it might be argued by the Congress of the United States, it might be said by Congressmen: "If all the world is to be permitted to go up there and take the seals, we might as well let our own citizens go. We will not protect the seals against attacks by our own citizens if other people are to be allowed to attack them".

The President. You want to convince us first and the American Congress afterwards, while you ought to convince the American Congress first and us afterwards. That is what I mean. It is merely a point in my mind.

Mr. Carter. That the American Congress, after this Tribunal shall have established American rights, will hesitate at all in exercising the utmost degree of protection, is scarcely to be apprehended.

The President. But it might have been in argument before us that the American Congress had already admitted the right.

Senator Morgan. You will remember that Lord Salisbury, I think, or Lord Rosebery, in discussing the *modus vivendi* which is now governing this matter, made the objection that the British Government and the American Government would be tying their hands by agreeing upon the prohibition of pelagic sealing during the pendency of this litigation, and permitting other nations to come in and take the seals at their will. Both Governments had to take the risk of it.

Mr. Carter. Yes; that is undoubtedly true. But still the observation of the President is correct, namely, that if the United States had a property in these seals and a right to protect them upon its own possessions, it could at all times have prevented its own citizens from taking seals even in the northern Pacific Ocean. It could have done that. It has not done it; and so far as that is an argument bearing upon the merits of this question of property, I must allow it to pass unanswered; but as to the force and weight of it, I must be permitted to say that it does not seem to be very significant.

The President. It merely shows the question is a delicate and disputed one.

Mr. Carter. The policy of passing laws of that character, the direct operation of which would be — allowing that these pelagic sealers were mere marauders — to restrain your own marauders for the benefit of the marauders of another nation, is not a very obvious one.

There is one other fact perfectly indisputable in regard to pelagic sealing, and that is this: the moment its destructive effect reaches a point where the maintenance of the industry on the Pribilof Islands ceases to be remunerative — that is, when it reaches that point where it is no longer worth while to maintain that establishment of two or three hundred Indians which are kept upon those islands — then, of course, that industry must be given up; and when that industry is given up, that population must be withdrawn. They cannot live there without outside support. And then, of course, all protection to those islands against the marauding excursions of people who want to kill them upon the land is gone, and when that guard is withdrawn and all protection taken away, that herd of seals is exterminated. It is exterminated for the United States. It is exterminated for these lessees. They can no longer get anything out of it. It is exterminated for the whole world. It is exterminated even in respect to these pelagic sealers, for their occupation is gone also. They are all gone, in a common calamity, and gone very quick, too, after the guard is withdrawn, and that will take place just as soon as it ceases to be profitable to maintain it there.

Now, there is a superfluity of young males. That superfluity of young males can be taken upon the islands, and the taking can be limited to that, provided all interference is prevented by sea, provided pelagic sealing is stopped. That fact — although it appears to be manifest — that there is a superfluity of young males, is one which I wish to place beyond doubt. We say it amounts to 100,000; but whether it amounts to 50,000 or 100,000 or 200,000, there is a superfluity, and that superfluity can be separated and taken by the United States on those islands without injuring the stock. As I say, that seems to be self-evident, but I do not know that it will be admitted, and I choose to state one or two circumstances which prove it.

We have witnesses long resident upon the island and in charge of this business, who swore to it; but it is also proved by the overwhelming experience of one hundred years. It is proved by the fact that Russia, after her occupation of the islands, and while she did not confine her draft to this superfluity of males, adopted a course which tended towards the destruction of the herd and came very near destroying it. It is proved by the fact that when she corrected her methods and confined her draft to this superfluity, in 1846, the herd continued to increase; so that when twenty years later it passed into the possession of the United States, it had reached as great a magnitude as it had ever had. It is proved, in the next place, by the experience of the United States during more than ten years of their occupation, and until the excessive drafts occasioned by the pelagic sealing made this draft of 100,000 males an undue draft upon the herd.

Therefore this statement is fully substantiated by the uniform experience on the islands — an experience extending over a period of one hundred years. It is substantially, I think, admitted by the British Commissioners themselves.

In Section 37, at page 7, of their report, they say :

37. During the early years of the Russian control, the conditions of seal life were very imperfectly understood, and but little regard was paid to the subject. A rapid diminution in the number of seals frequenting the islands, however, eventually claimed attention, and improvements of various kinds followed. Among the first of the more stringent measures adopted was the restriction of killing to males, which followed from the discovery that a much larger number of males were born than were actually required for service on the breeding "rookeries." The killing of females was practically forbidden on the Pribilof Islands about 1847, and on the Commander Islands probably about the same date.

I pass to section 41 :

41. It is also noteworthy, that for many years previous to the close of the Russian control (probably from about 1842) under a more enlightened system

of management than that of the earlier years, the number of seals resorting to the islands was slowly increasing, and that the average number taken annually was gradually raised during these years from a very low figure to about 30,000, without apparently reversing this steady improvement in the numbers resorting to the islands.

I pass to section 116, on page 19 :

116. It is, moreover, equally clear, from the known facts, that efficient protection is much more easily afforded on the breeding islands at sea. The control of the number of seals killed on shore might easily be made absolute, and, as the area of the breeding islands is small, it should not be difficult to completely safeguard these from raiding by outsiders and from other illegal acts.

And Section 327, on page 58 :

327. Thus, on the Pribyloff Islands, one particular instance has been recorded, when, in consequence of the long persistence of field-ice about the islands, the seals were very greatly depleted. This occurred in 1836, when, according to native count, the number of adult seals on St. Paul Island was reduced to about 4,000, and the greater part of the small number of seals killed in that year consisted of pups. Other, thought less disastrous instances, of the same kind have occurred since, and a study of available information respecting the amount and position of the ice in Behring Sea in various years shows that such adverse conditions may recur in any year, though probably seldom with the same intensity as in 1836.

That serves to show from how low a point the numbers of the seal herd on the island, under the practice of limiting the draft to young males, increased to their subsequent magnitude.

I now read section 659, page 114 :

659. The system adopted for the regulation and working of the Pribiloff Islands by the United States' Government, when its control had been established, and after the irregular and excessive killing which at first followed on the withdrawal of the Russian authorities, was substantially that which had gradually been introduced by the Russians, as the result of their prolonged experience, but with one very important exception. This exception related to the number of seals allowed to be killed annually. The number was at this time suddenly and very largely increased, being in fact more than doubled, as is elsewhere pointed out in detail; and while the experience of many former years showed that the Russian system, with a limited annual killing, might be maintained with a reasonable certainty of the continued well-being of the breeding grounds, it had in fact, according to the best available information, resulted in a gradual and nearly steady increase in number of seals. The much larger number permitted to be killed under the new regulations at once removed the new control into the region of experiment.

That shows that the former control, the Russian control, at least, resulted in a steady, and gradual increase in the number of seals.

I continue to read,

660. Theoretically, and apart from this question of number and other

matters incidental to the actual working of the methods employed, these were exceedingly proper and well conceived to insure a large continual annual output of skins from the breeding islands, always under the supposition that the lessees of these islands could have no competitors in the North Pacific. It was assumed that equal or proximately equal numbers of males and females were born, that these were subject to equal losses by death or accident, and that, in consequence of the polygamous habits of the fur-seals, a large number of males of any given merchantable age might be slaughtered each year without seriously, or at all, interfering with the advantageous proportion of males remaining for breeding purposes.

661. The existence of the breeding rookeries as distinct from the hauling-grounds of the young males, or holluschickie, was supposed to admit, and did in former years to a great extent admit, of these young males being killed without disturbing the breeding animals. The young seals thus "hauling" apart from the actual breeding grounds were surrounded by natives and driven off to some convenient place, where males of suitable size were clubbed to death, and from which the rejected animals were allowed to return to the sea. The carcasses were skinned on the killing ground, the skins salted, and at a later date bundled in pairs and shipped, with such duplication or checking of count as might be supposed to afford guarantees to the agents of the Government and to the lessees that the interest of both were fairly treated.

662. There can be no doubt that if the number permitted to be killed had been fixed at an amount so low as to allow for exceptional and unavoidable natural causes of interference with seal life, and if it had been rearranged each year in conformity with the ascertained conditions, killing might have been continued without general damage to the seal life of the Pribilof Islands, and very probably even with a continued gradual increase in numbers of seals resorting to the islands up to some unknown maximum point. Such results might have followed, notwithstanding the practical imperfection which clearly attached in execution to these theoretically appropriate methods, and in spite of the important change from natural conditions which any disturbance in proportion of sexes involved, if the demands made in the matter of annual take had been moderate; but when the number fixed for killing resulted, as has been shown, in an average slaughter of over 103,000 seals, it bore so large a proportion to the entire number of animals resorting to the islands as to lead necessarily in the long run to serious diminution. This decrease continued, on the whole, in an increasing ratio, being due not only to the actual number of seals slaughtered, but also to the numbers lost in various ways incidental to the methods of control and *modus operandi* on the islands, which loss, though formerly a matter of minor importance (because counted against a large annual surplus), in the face of the greatly decreased numbers, became a very serious addition to the total of diminution. In short, from a transcendental point of view, the methods proposed were appropriate and even perfect, but in practical execution, and as judged by the results of a series of years, they proved to be faulty injurious.

The President. Will you be kind enough to remind us of the maximum annual number of the slaughter under the Russian rule?

Mr. Carter. At first it was somewhere in the neighborhood of 30,000. In the last years of their occupation, it was increased to somewhere from 50,000 to 70,000.

Sir Charles Russell. You will find, sir, a table giving the figures at page 132 of the British Commissioners report beginning in 1878 and going down to 1891.

Mr. Phelps. That is mere assumption.

Mr. Carter. We do not concede that to be a correct statement.

Sir Charles Russell. It purports to be a correct statement.

Mr. Carter. It purports to be that; in fact it is not even approximately correct.

The President. You do not know that the Russian Government had the same rule as the American Government had of fixing a limitation for the annual taking?

Mr. Carter. It did have the same rule.

The President. The same rule all the time?

Mr. Carter. After the system was established of limiting the drafts, to the males.

Senator Morgan. In 1847.

Mr. Carter. The learned Arbitrators will perceive from these passages which I have read from the British report that there is a full and unqualified concession that the methods thus employed by the American Government on the islands are perfect in theory, and the only defect alleged in relation to them is in their practical execution; and the only particular here in which they mention a fault in the execution of those methods is that they do not confine the draft to a sufficiently low limit. What that limit is they do not attempt to say; but the complaint they make of the execution in these methods is that too large a draft is drawn. My proposition is that there is a point at which it is perfectly safe to make a draft without any danger whatever to the herd. What that point may be is another question. We say 100,000; and shall be able to make that good.

I have gone thus far only upon facts which I conceive either to be admitted, or overwhelmingly established — established in such a manner that we may say they are beyond dispute. There are a good many other particulars here in which there is very considerable conflict in the evidence. We have our own assertions in respect to those points upon which this conflict exists; and we shall endeavor to satisfy the Arbitrators that our view is correct; but at this point I choose to say that in my view they are not material upon this question of property. I want to state a few of these points which I consider to be immaterial upon this question of property. I can argue this question of property without considering any of these disputed propositions.

These things are more or less disputed; and I do not base any part of my argument at present upon them. In the first place, it

is said that not so large a proportion as 75 per cent of the pelagic catch is females.

If it were not any where near that figure — if it was even 20 per cent, it would answer all the purposes which I desire.

Second. It is not agreed that so great a number as one quarter or 25 per cent are wounded and are not recovered.

Third. It is not agreed that females go out for food at great distances upon the sea. Indeed, I cannot say it is agreed upon the side of Great Britain that nursing females ever go out for food.

Fourth. It is not agreed that coition takes place on the land. They assert that it takes place elsewhere.

It is quite immaterial where it takes place.

Fifth. It is asserted on the part of Great Britain that more or less commingling takes place between the Russian and the Alaskan herds.

There is no evidence that there is the slightest commingling; but as far as conjectures go, it is only to the effect that there may be a commingling of some few individuals — wholly unimportant.

Sixth. It is not admitted on the part of Great Britain that the seals stay so long on the Pribilof Islands as the United States assert that they do.

That again is of no importance, whether they stay there three or four or five months; if they stay there long enough to submit themselves to human power, so that man can take from them the annual increase without disturbing the stock, that answers all the purposes of my argument.

Again, it is said that raids take place upon the islands and a point is made that a great many seals are lost, not by pelagic sealing, but by illegitimate raids upon the island by sealers which the United States does not protect against.

It is immaterial whether there are or whether there are not for the purposes of my argument; but there are not, in our view, any of any consequence.

And again, what I have already said, it is alleged that a draft of 100000 young males is too large.

We do not think it too large. But what if it is. We can find out the right number. Experience will tell us that; and of course self-interest, the strongest motive operating upon men, will insure our obedience to its dictates.

Then again it is said that the lessees of these islands are careless and negligent in the methods of taking these seals and separating them and driving them for slaughter, the assertion being that the drives are too long, that they are made in a way that is oppressive to the seals, that a good many of the seals driven and

which are not fit for capture but turned aside to go back again, are so much injured that they never get back and are practically lost to the herd.

We conceive all those statements are unfounded; but even if they were true, they would not be material. They would simply show we had been guilty of negligence there. There is nobody who is under so strong a motive to practice diligence as we are, and it is presumable certainly, if there are any neglects, that they will be ascertained and corrected.

[The Tribunal thereupon adjourned until Friday, April 21, 1893, at 11 : 30 a. m.]

THIRTEENTH DAY. APRIL, 21ST, 1893

The Tribunal met pursuant to adjournment.

The President. Mr. Carter, will you proceed?

Mr. Carter. Mr. President, the principal part of my argument yesterday was devoted to a review of the questions of fact connected with the nature and habits of the fur-seal, and the modes by which they were pursued and captured; and that review of facts led to these conclusions as matters of fact: In the first place that the United States in consequence of their proprietorship of the Pribilof Islands had a control over the seals which enabled them to take the superfluous increase and supply it to the uses of the world; that that opportunity it had always improved and still improves; that no other nation, or the citizens of any other nation, have the power, or the ability, to do that thing; that the race of fur-seals could not maintain itself against unregulated and unrestricted attack; that it could be destroyed at a blow almost on the land, and it could also be destroyed, although not so rapidly, on the sea; that all pelagic pursuit of the animal was necessarily destructive in its tendency, and if carried to any considerable extent would work an entire commercial extermination of the race in a comparatively short period of time; that it struck at once at the stock, and not at the increase; that its depredations were principally aimed at the females, and not at the superfluous males, and that no discrimination could be made.

I am now to call attention to the inquiry how the question of property is affected by those facts in the light of the principles which I have endeavored to lay down respecting the institution of property and the grounds and reasons upon which it rests. I wish to apply those principles to the question of property in the fur-seals, and bring those principles to bear upon the conclusions of fact to which I yesterday arrived.

Let me recall the main proposition early established in the course of my argument, and which I have endeavored to keep in view throughout, namely this: That the institution of property extends to all things which embrace these three conditions — first; that they are objects of human desire, that is to say objects

of utility. Second; that they are exhaustible, that is to say the supply of them is limited, there not being enough for all. And, third, that they are capable of exclusive appropriation. All things of which those three conditions can be predicated are property and nothing which does not unite all those conditions can be regarded as property.

Concerning the first two of these conditions, no debate whatever is necessary. The utility of the animal is admitted. That they are objects of extreme human desire is conceded. That the supply is limited is also conceded. The race is exhaustible. There is not enough for all. The only question, therefore, as to whether they are property or not, must turn upon the determination of the point *whether or not they are susceptible of exclusive appropriation*. That is the interesting point in reference to the question whether seals are property or not. Are they capable of exclusive appropriation by man?

In the first place, we must have a very clear perception of what is meant by the term "*exclusive appropriation*". What is it that must be done that an owner of a thing may exclusively appropriate it? Is it necessary that the thing must be actually *in manu*, as it were — in the actual possession of the owner so that no person can take it from him without an exercise of force? Is that necessary, or is something short of that sufficient? In the early ages of property that seems to have been necessary; and property and ownership were in those early ages identical, or rather they were confounded. There were no recognized rights of property, except in respect to such property as the owner was in the actual possession of. The skins upon the back of the hunter, the bow and arrow which he used in the chase, and the hut, or the cave, which he inhabited, were all in his actual possession, or under his immediate power. They could not be taken from him without an act of force. He was always present to defend them; and there were no subjects of property beyond those which could be possessed in this full and complete manner. But we see that as the institution of property is developed that is no longer necessary. A man may own not only the half acre of ground which he tills, and which he can immediately defend, but he may own a hundred thousand acres by as perfect a title as he can own the half acre; and in reference to all personal property, the extent of the ownership which is permitted to him is unlimited. He may not actually possess it. He may not be present to defend it; and yet the law stamps his personality upon it so that it becomes his property, a part of him, an extension of his personality to that portion of the material world, so that when that thing which he thus owns is invaded his rights are touched,

his personality is touched. Here we see the difference between the two conceptions of *possession* and of *ownership*, originally closely identified, inseparable from each other, as it were, confounded together; but with the progress of society and the development of the institution of property, separated, and the conception of ownership, as distinct from the necessity of possession fully recognized.

I have many authorities to support that, but I must avoid reading authorities because it takes so much time. But to briefly develop it, I may read one or two that are quite significant. I read from page 82 of the Argument of the United States an extract from the writings of a very distinguished English jurist and writer upon general jurisprudence — Mr. Sheldon Amos. He touches upon this subject :

The fact or institution of ownership is such an indispensable condition to any material or social progress that, even throughout the period during which the attention of law is concentrated upon family and village ownership, the ownership on the part of individual persons, of those things which are needed for the sustenance of physical life, becomes increasingly recognized as a possibility or necessity. One of the most important steps out of savagery into civilization is marked by the fact that the security of tenure depends upon some further condition than the mere circumstance of possession.

The use of the products of the earth, and still more, the manufacture of them into novel substances, consists, generally, of continuous processes extending over a length of time during which the watchful attention of the worker can only be intermittently fixed upon all the several points and stages. The methods of agriculture and grazing, as well as the simplest applications of the principle of division of labor, similarly presuppose the repeated absence of the farmer or mechanic from one part of his work, while he is bestowing undistracted toil upon another part; or else entire absorption in one class of work, coupled with a steady reliance that another class of work, of equal importance to himself, is the object of corresponding exertion on the part of others.

In all these cases the mere fact of physical holding or *possession*, in the narrowest sense, is no test whatever of the interests or claims of persons in the things by which they are surrounded.

The extract from a French writer Toullier which follows in a note is so long that I will not read it; but it is to the same effect of marking the distinction between possession and ownership, and showing that ownership is a development in the course of civilization of the institution of property, and that ownership at present no longer depends upon actual possession at all; it depends upon rights which the law gives. If the law chooses to stamp the personality of the owner upon any particular piece of property, however large or however extended, whether it is in his possession, or out of his possession, then that object upon which the law thus stamps the quality of ownership, is the subject of exclusive appropriation in the law.

It is the law that does this. Originally property depended much upon individual effort and the power of individual defence. Now, in the development of civilization it depends upon law; and whatever the law regards as the subject of exclusive appropriation is to be regarded as property provided it presents the other conditions which I have mentioned. The inquiry is, therefore, under what circumstances and to what extent will the law stamp the quality of ownership upon things which either are not possessed, or cannot be actually possessed, by any owner during a considerable part of the time. Under what circumstances and to what extent will the law assign to a man a title and defend it? That is the interesting question.

The best way to answer that is to see what the law actually does; and we may take, in the first instance, the case of *land*. As I have already said, land may be owned by a private individual to any extent. He may own a province if he can acquire it. The law places no limit upon his acquisition and it will defend him in that possession. Why is it? As I have already shown the institution of property does not depend upon any arbitrary reasons, but upon great social reasons and great social necessities; and, therefore, the answer to the question why the law allows an extent of property to be owned by a man which he cannot by any possibility actually possess, must be found in some great social necessity; and it is that necessity to which I have already alluded, namely, the demands of civilization, which make it necessary that the sources of the fruits of the earth, and its productiveness, should be increased in order to accommodate the wants of the increasing population of mankind. No land will be cultivated unless you award to the individual the product of his labor in cultivating it. The motives of self interest are appealed to, and men are told: "You may have, and we will defend your title to, as much land as you can acquire." That is the only way in which the earth would ever be cultivated. That is the only way in which it is made to produce the enormous increase which it now produces; and although it is not itself capable of actual possession by the owner, yet in view of the prodigious advantages which are acquired by stamping the character of ownership upon it, the law concedes that ownership, assigns the title to an individual, and protects and defends him in it. The same is the case in reference to all movable property, all products of manufacture and of labor — agricultural implements and tools, goods of all descriptions. A man may own magazines full of them which he cannot by any possibility, by his individual arm, protect and defend. Why is he permitted to do this? Because the world cannot otherwise have them. They are the price which the world must necessarily pay for these possessions, or otherwise it must

do without them : and it cannot do without them and support the population which civilization brings upon the earth.

Take the case of useful domestic animals ; the same thing is true. Man may own as many as he can acquire and breed ; and they may roam over almost boundless areas, over his own property or the property of the public, and still his title is complete and perfect. In the barbaric ages a man could own but few and when the number increased it was the property of the tribe ; but that condition of things would not support the demands of civilization. You must appeal to the cupidity of men and arouse them to labor and to efforts for the purpose of increasing the stock of domestic animals ; and therefore a title is awarded to as many as a man can bring into existence. The great prairies and wastes of the interior of the United States, and of large regions in South America are fed upon by countless herds, and yet the title of the owner to every one which he can identify is distinct and absolute. That is for the same reason. You could not have them unless you gave that ownership. And society could not enjoy the benefit unless it paid this price.

You will see that in all those cases the owner is enabled to preserve the principal thing without destroying it and yet produce a great increase for the use of mankind. The cultivator of land, the title to which is assigned to him, does not waste it. He does not destroy it. He does not convert it into a desolation, he does not extract its richness from it and then leave it incapable of further product. He cultivates it. He manures it. He not only extracts a great product from it but he increases its ability for further production ; and so also in regard to the races of animals. The stock is not invaded so long as you allow individuals the ownership of whatever they are able to produce. They preserve the stock every where, and they increase overwhelmingly the product which can be afforded for the uses of mankind.

But step for an instant to where this result cannot be accomplished ; and society at once refuses to allow an individual property in them ; refuses to consider the things as the subjects of exclusive appropriation. Take the birds of the air, the fishes of the sea — wild animals generally. A man cannot by any exercise of his art or industry so deal with them as to furnish their increase for the use of mankind without destroying the stock. He cannot do it. He can only take them indiscriminately. He can practice no husbandry in relation to them ; and if they maintain their existence under his attacks it is because nature has made such an enormous provision that they are practically inexhaustible, or because nature has furnished them with such facilities for escape that man cannot capture any considerable number of them. Consequently in

reference to all of these wild animals where the award of ownership to an individual man would produce no great social blessing, in other words, where there are no social reasons for awarding exclusive possession, an exclusive possession is not awarded, and, the thing is regarded as incapable of exclusive appropriation.

But, even in the case of wild animals, although the institution of property in respect to them would not accomplish any social good, would not prevent their extermination, still society resorts to the best means in its power to prevent their destruction, and it assumes a sort of custody or ownership over them by the establishment of what are called "game laws", more or less effective for preserving the wild races of animals, but still ineffective where the demand for them is so great and their facilities for escape so little that the ravages of man become destructive.

There are some animals which lie near the boundary lines between the wild and tame and it is very interesting to see how the law deals with these, and how perfectly in accordance with the principle I am endeavoring to sustain. Take the case of bees; they are perfectly wild. Nothing can be wilder. Nevertheless man can induce them to return to a particular spot; and in consequence of that can take from the bees their product, and can therefore increase the production of honey, — a most useful article — to an almost indefinite extent. If men were driven for their supply of honey to find the hives of wild bees in the forest their demand could never be supplied and the bees themselves would speedily be exterminated because the food which they eat would be taken away; but if you award a property in the bees to man, permit him to defend his title to them, and to every swarm that forms itself in a hive, and, at the appropriate season leaves in order to create a new habitation for itself — if you give him a title to that, enable him to practice a husbandry, allow him to consider as exclusively appropriated to himself what in its own nature is absolutely incapable of appropriation, — if the law will step to the aid of human infirmity and grant these rights — then you can have this product of honey multiplied to an indefinite extent. Society does it. It does it for that purpose.

The same is true of the wild geese and swans. The breeding of these is an industry, to be sure, not carried on on so large a scale; but it presents the same principles. If we were driven for our supply of such birds to pursue the wild flocks with such means as are adapted for that purpose, the supply procurable would be extremely small; but if man can so far reclaim them as to wont them to a particular place, take the annual increase from them and preserve the stock, then without injuring the supply of the world you greatly multiply the product which is applicable to the uses of

man. In other words, you bring in the occasion upon which the law will lend its aid to man, and say that these things shall be deemed exclusively appropriated; and it does so.

The case of deer upon which I have already enlarged is the same. Pigeons the same. The reindeer of Lapland is another instance of an animal especially wild, but in which the law assigns to man a property interest and deems them exclusive property although they wander over vast regions, and, instead of following their owners, I believe the owners follow them.

Now we see the principle which lies at the foundation of the municipal law which I alluded to in the early part of my argument, the municipal law of all civilized nations concurring upon these points, and declaring in regard to every one of these animals commonly designated as wild, that if man can so deal with them as to take their annual increase and preserve the stock then, notwithstanding they may fly out of his possession at will, still, the law will regard them as subjects of exclusive appropriation.

But the law does not stop there. It is interesting to observe that it will go to all extremities, wherever there is a social advantage to be gained and will allow a thing to be the subject of property and to be regarded as the subject of exclusive appropriation, although it is absolutely intangible. Take patents for useful inventions, products of the mind, and, originally, not the subjects of property at all. But as society advances, as civilization develops, as the need of these products of the mind increases, society perceives that it cannot have them unless it encourages the production of them; and there is no other way of encouraging the production except by awarding to the meritorious authors of them all the benefits of a property interest; and it does so. We have had for a very long series of years a property awarded in respect to inventions in the useful arts. The principle of a monopoly, odious in general, is applied here; and society does not, or rather will not stop there. That extension of the rights of property to inventions in the useful arts did not go so far as to give a right of property in all the products of the mind. Literary works, books of every description, were still not the subject of property. They could be appropriated the world over, by whomsoever pleased to appropriate them, and without giving any ground of complaint to the author; but all of us understand how gradually and by degrees that has been considered to be a wrong and not in accordance with the principles of natural law, not in accordance with the principles of justice; and so, after a while, the rights of authors in their intellectual products were secured to them by copyright laws which are enacted I suppose in every civilized state; and now there is a tendency and disposition and determination, let me say, to carry it still further.

An international copyright, securing the benefits of ownership in the products of the mind all over the world is impatiently awaited and will probably, ere long, be enacted.

This is the development of the institution of property. This is the development of the conception of ownership as distinguished from actual possession. Society will award this right of property, and will determine that things can be exclusively appropriated wherever there is a social good to be accomplished. It is thus that human society, proceeding step by step, and from age to age, rears its majestic arrangements, making provision for the satisfaction of every want of man, and every aspiration towards civilization, and shaping and conforming all its methods in accordance with the dictates of natural law.

What is the general conclusion in respect to animals which I conceive to be established by this reasoning? It is this: That wherever an animal, although commonly designated as wild, voluntarily subjects itself to human power to such an extent as to enable particular men, or a particular nation, to deal with that animal so as to take its annual increase and at the same time to preserve the stock, it is the subject of property. That proposition seems to me to be so reasonable upon the mere statement that it ought to be allowed without argument; but I have endeavored to begin at the beginning, and to show that every ground and every reason which supports the award of property any where and to any extent, applies to that case, and makes the animal the subject of property.

It only remains to apply that conclusion to the particular animal about which our controversy is concerned-seals. I need not, of course, recapitulate again the facts. They are all fresh in your recollection. It is enough to say that they do submit themselves voluntarily to the power of man to such an extent as to enable the owners of the Pribylof Islands, to whose power they thus submit themselves, to take the superfluous annual increase without destroying the stock; and that is the way and the only way in which the human race under civilized conditions can continue to enjoy the benefits of that blessing of Providence. Unless an award of property is made to the United States in that animal, or what is equivalent to it, the fate of the animal is already sealed.

In looking at the meritorious features which the owners of the Pribylof Islands exhibit, and which constitute their title to this award of property, it may at first sight appear that they do not have the same sort of merit that the cultivator of the land has to the bushel of grain that he produces, or that the manufacturer of an agricultural implement has, which is in every part of it the fruit of his labor; but when you look closely into the case you will see that the merit of the owners of those islands is precisely of the

same character and goes to the same extent; and that the present existence of that herd is just as much due to a meritorious, voluntary, exercise of effort on the part of the owners of those islands as any product of mechanical industry is due to the workman who fashions it. This species of property it will be remembered is called by Blackstone property *per industriam* and very properly called so. Now, what industry is exhibited by the owners of these islands to entitle them to say that the seals are their property *per industriam*? They remove a population of hundreds of people at great expense to those islands, feed them, keep them there to protect these animals and their breeding places against all enemies. Unless that were done, marauders would swoop down upon those islands and destroy them at once. In the next place they do not kill the seals indiscriminately. They practice abstinence, self-denial. They might kill every animal as it arrives and put its skin on the market at once and get the full benefit of it. That is the temptation always to man, to take the utmost that he can, and to take it at once for present enjoyment. But the owners of the Pribylof Islands practice a self-denial. They forego present enjoyment. They forbid themselves that enjoyment and they do it in the hope of obtaining a future and a larger good.

I wish to dwell a moment upon the merits of that particular feature of abstinence. I have given in the printed argument a multitude of citations which illustrate the merit of this quality of abstinence as a foundation for property. All political economists, for instance, in treating of the question of interest, and the moral right which a man has to exact interest for the use of money, defend it upon this ground. Capital is lent and interest is taken upon it. What is capital? It is the fruit of saving. A man who has produced something, instead of spending it in luxuries, saves it; no man can save for himself alone. He saves for the whole world as well. He saves something which will support productive industry, and the whole productive industry of the world depends upon the savings of the world. If it was not for the practice of this abstinence which leads to the accumulation of wealth which may be employed for the purpose of sustaining productive industry, productive industry would be impossible.

Mr. Senior, in his Political Economy — he is an author of recognized authority — says (I read from page 93 from the note) :

But although human labour and the agency of nature, independently of that of man, are the primary productive powers, they require the concurrence of a third productive principle to give them complete efficiency. The most laborious population inhabiting the most fertile territory, if they devoted all their labour to the production of immediate results and consumed its produce as it arose, would soon find their utmost exertions insufficient to produce even the mere necessities of existence.

To the third principle or instrument of production, without which the two others are inefficient, we shall give the name of *abstinence*, a term by which we express the conduct of a person who either abstains from the unproductive use of what he can command, or designedly prefers the production of remote to that of immediate results.

After defining capital as "an article of wealth, the result of human exertion employed in the production or distribution of wealth", he goes on to say: "It is evident that capital thus defined is not a simple productive instrument.

It is in most cases the result of all the three productive instruments combined. Some natural agent must have afforded the material; some delay of enjoyment must in general have reserved it from unproductive use and some labor must in general have been employed to prepare and preserve it. *By the word abstinence we wish to express that agent, distinct from labour and the agency of nature, the concurrence of which is necessary to the existence of capital and which stands in the same relation to profit as labour does to wages.*

Wherever you can find among men a disposition to forego immediate enjoyment for the purpose of accomplishing a future good you find a prime element of civilization, and it is that which society encourages, and worthily encourages, I have no time to read further from these citations upon the merit of abstinence; but I especially commend them to the attention of the learned Arbitrators. That is what is exhibited upon these Pribylof Islands. The United States, or its lessees, do not disturb these animals as they come. They invite them to come. They cherish them while they are there. They protect them against all other enemies. They carefully encourage, so far as they can, all the offices of reproduction, and, at the appropriate time they select from the superfluous males, that cannot do any good to the herd and may, under certain circumstances, do injury to it, the entire annual increase of the animal and apply it to the purposes of mankind; and, without the exercise of those qualities, as is perfectly plain, that herd would have been swept from existence half a century ago, and the Pribylof Islands would have been in the same condition in respect to seals as the Falkland Islands, or the Masafuera Islands, and other localities, once the seats of mighty populations of these animals.

It is upon these considerations that I base the position of the United States, that it has a right of property in those seals. There is no principle upon which the law of property rests which does not defend it, and there is no rule of the municipal law itself, so far as that law speaks, which does not support it. They defend it completely and absolutely; and when we step beyond the boundaries of municipal law to the moral law, the law of nature, that law which is the foundation of international law, it also speaks with a concurring voice; and in whatever direction we prosecute our researches we find uniform support for grounds or reasons on this subject, they all concur and contribute to this one

conclusion that upon every ground of right and reason, the property of the United States in that seal herd is complete and absolute, not only while it is upon the islands, but wherever it wanders, and protected by the safeguards which property carries with it wherever it has a right to go.

If there were anything which might be urged against this conclusion, we might be disposed to hesitate. But what is there that can be urged against it. What right is there that can be set up against it? If there were anybody who could set up a right against this conclusion, a different case would be made. If any man or set of men, or any nation, could say: "This conclusion of yours, plausible enough in itself, defensible enough in itself, nevertheless comes into collision with a right of ours, defensible upon like grounds, that is, moral grounds." If that could be set up, it would raise a doubt. But what is there? What right is there in these pelagic sealers — for they are all we have to deal with — to contend against this conclusion? What is their right founded upon? As near as I can ascertain, it is a right to pursue the animal because it is a free swimming animal, in the first place, and because, in the next place, there is no power on the sea to prevent it. That does not suggest a principle of right at all, a right to pursue an animal because he swims freely in the sea — a right to destroy him on that account. What ground is that upon which to attempt to establish a *right*, I should like to know. Why should one be permitted to destroy a useful race of animals, a blessing of mankind, because they happen to move freely in the sea? I cannot conceive that that suggests even the shadow of a right.

The other ground asserted as a defense for pelagic sealing, namely, that however perfect the property right of the United States may be, they have no power to interfere with pelagic sealers on the high seas, is wholly untenable. It seems to amount to the solecism that there may be a *right* to do a *wrong* upon the sea!

There is no more right to do a wrong upon the sea than there is upon the land. What is this right to carry on pelagic sealing? What is this right to take these free swimming animals in the sea, mostly females heavy with young, or sucking their pups? What is that kind of a right? We have seen that it necessarily involves the destruction of the animal. How can you connect the notion of a right with that? It is a right to sweep from the face of the earth and deprive mankind of the use of a useful race of animals. What sort of an act is that, to destroy a useful race of animals? It is a crime; is it not? How else can it by any possibility be correctly described? It is a crime against nature. It is a defiance of natural law; and if it were committed within the boundaries of any civilized and Christian state, would be punished as a crime by mu-

municipal law. It has no characteristic, and no quality, but that of a *crime*. What good does it accomplish? Does it give to mankind a single seal which cannot be taken in a cheaper, and a better way? I have already shown that the entire product of this animal can be taken upon the islands by a less expensive method, and in a way such as to preserve the quality of the skins in a better manner. It does not do a single good to mankind. It is possible that seals may be afforded at a less price for a time to the world by the practice of pelagic sealing. Of course if you can put upon the market, in addition to what is taken upon the islands, another hundred thousand seals taken in the water, you can temporarily reduce the price; and, although the method of taking them is more expensive, the world may get them for a while at a less cost; but you are taking the stock, are you not? You are not taking the increase. The question, and the only question, is how the increase of the animal can be best taken for the purposes of mankind. You have no right to have anything else. Anything else is destruction. Therefore these sealers are doing no good to mankind. They are doing no good to anybody. They are destroying the occupations of the large number of manufacturers, of whom there are thousands, residing in Great Britain and whose occupation consists in manufacturing the skins for market. Their occupation is taken away by it. They are doing injury in every direction. They are doing no good to anyone, not even themselves, for their own occupation is gone in a few years. Nature has so ordered it that any pursuit or occupation like this which consists simply in destroying one of the blessings of Providence, does no good, and nothing but evil, in any direction. We say we are taking the entire product of this animal, furnishing it to the commerce of the world in the least expensive and in the best manner. Why do you not permit us to do it? Why break up this employment? There seems to be no good reason for it. Then again, as I have already said in an earlier part of my argument, one of the limitations to which property is subject, and especially property owned by nations, is a trust for the benefit of mankind. Those who have the custody of it and the management of it have a duty in respect to it. Indeed the whole subject of rights should be regarded as one dependent upon duties, rights springing out of duties, rather than duties out of rights. It is the duty of the United States to cultivate that bounty of nature, the possession of which is thus assigned to them, and to make it productive for the purposes of the world. That is their duty. Why should they not be permitted to perform it? Can a reason be assigned why they shall not be permitted to perform that duty. They can not perform that duty, if the animal is destroyed.

Has the United States the right to destroy that seal? It has the power. Has it the right? Has it the right to go upon those islands and club every seal to death and thus deprive the world of the benefit of them? Certainly not. Have these pelagic sealers any better right to do that than the United States have? I have no doubt that if the United States should wilfully say: "We will destroy that property. Although having the ability to preserve it, we will destroy this property" — and it were the case of a piece of property the use of which was absolutely necessary to mankind—if the seal contained some quality which was highly medicinal, a specific against certain diseases which afflict the human race, and the possession of which was necessary in order to enable the human race to withstand such disease—the world would have a right to interfere, take possession of those islands, and discharge those duties which the United States were betraying. What duty have these pelagic sealers in respect to these seals? They have none because they cannot do anything but mischief with them. The United States has a duty. It is to cultivate that advantage which in the great partition among nations of the blessings of the earth has fallen to their lot. It is the duty of the United States to preserve it, to cultivate it and to improve it. Shall they not have the power to do it? Is it not the duty of other nations and other men to abstain from interference? It seems to me that nothing can be plainer than that conclusion.

There is no right, therefore, that can be set up against it. Well, if there were something less than a right, if there were some inconvenience to which mankind were subjected, if pelagic sealing were prohibited and an exclusive property interest awarded to the United States, we might hesitate; but there is not. There is no inconvenience even. There is indeed a suggestion on the part of Great Britain of an inconvenience in this particular. It is said that it is building up a monopoly for the United States, enabling them to gain a monopoly in the sealskins and thereby acquire a great profit. Well, I admit that it is a monopoly. There is always a monopoly when one particular nation or particular men own an entire source of supply. It is not an absolute monopoly, for there is a certain competition on the part of Russia and Japan; but it is in the nature of a monopoly of course. Where there is an object in nature of which the supply is limited, if the source lies wholly within the power of some particular nation it must necessarily have a monopoly. That is unavoidable. But it is a monopoly to the United States, of course, only because the United States happens to have those particular islands. The possession of them, the sovereignty over them must be awarded to some nation, and therefore a monopoly is in a certain sense neces-

sary. But is it an injurious monopoly, is it an objectionable monopoly? Not at all.

Senator Morgan. The islands were bought chiefly on that account, were they not?

Mr. Carter. I do not know that they were. I hardly think they were.

Senator Morgan. What else was there?

Mr. Carter. There was not much else except territory. It is sometimes said that they were bought on that account, and there are some evidences that I have read tending to show that that was one of the main considerations; but whether that was the real motive or not I cannot say. I do not resort to that as furnishing the slightest strength to my argument. It is just as powerful without it. I am speaking as to whether it is a monopoly or not. When does a monopoly become injurious to man? It is only when it is an artificial monopoly. If there is a natural monopoly in a particular product and the whole of that particular product is thrown upon the world the price of it will necessarily depend upon the relation between the supply of it and the demand for it. Sometimes there is a monopoly in a particular region of the world of a particular article; but if the whole product of that particular region were thrown upon the market the price of it would be extremely cheap, and pay but a small profit and mankind would get it at a very low rate.

That is supposed to have once been the case with the Spice Islands, belonging to Holland. If all the pepper and other spices produced upon those islands were thrown upon the markets of the world, they would be glutted. The world would get them at a very trifling sum and the producers of the spices would make no profit at all. What did the proprietors of the Spice Islands do? They did not simply withhold from the market, for that would answer no purpose; but they made an *artificial scarcity* by destroying half the crop and thus creating a scarcity, and the world needing more than half, they were enabled to exact very high prices and to make a great profit. That is the only way in which a monopoly of a natural production can be made use of unfairly and disadvantageously to mankind, and be made the means of exacting an extortionate price. You must create an artificial demand. You must artificially limit the supply. You must withhold from the market something and therefore compel a great exaction. But not only has that never been done here, but it never can be done. I say it never can be done, because no profit can ever be found in it. There is a demand for every seal skin that can be produced and a profitable demand for every one that can be produced; and the whole supply is thrown upon the market. There is not one

withheld. The world is not compelled to take a single seal; and if there is a large price paid for the seals under those circumstances, that price is simply the result of competition among those who want them. If anybody is required to pay a large price for them, it is because somebody else is ready to pay a larger price. They are all contributed to the commerce of the world, as I have already said, just as if they were up at auction. The world bids for them and they go where the highest price can be obtained for them.

If the lessees of the Islands under those circumstances make, as they probably do make, a large profit, is there anything unfair or unjust about it? Taking into account what is paid to the United States and the profits of the lessees besides, all of which must be fairly regarded as the profits of the industry, there is of course a very large profit upon every skin that is sold; that is to say, the price of the skins may pay two or three times over for all the labor and all the expense which the gathering of the product costs. There is a very large profit. That goes to the United States, and to these lessees, is distributed among them. It is exacted, of course, from the citizens of the United States the same as it is from the rest of the world; but it goes to the United States and these lessees. What objection is there to that? Is that anything more than a fair remuneration from this bounty of Providence which is placed in their custody and in their control, and for their labor, their efforts, and their exertions in preserving it and furnishing it for the use of mankind? Of course not. It is perfectly fair. It may be the source of a profit. So there are a thousand things in commerce which are the sources of profit to particular nations which have natural advantages over other nations in producing them. The advantage is not different in its nature in this case.

In short it comes to this: That it is only by the exercise of the care, industry and self-denial on the part of the Government of the United States that the world can have this blessing. The whole of it is thrown upon the world and the price is determined solely by the buyers and by what they see fit to give. If the owners of the islands should see fit to withhold from the market at any particular time any considerable number of these skins, what would they do with them? How would they gain by that procedure at all? The next year, or the next — some time after that — they would be obliged to throw the part withheld upon the market and that would depress the market so that the loss they would incur in that way would far exceed any gain that there was any promise of. No, there never can be any temptation for keeping any part of the product, except under very unusual circumstances, such as a decline in the demand owing to some special circumstance, which might induce the proprietors of the islands to say: "We

think we can do better with the skins next year than this year." But in general they can reap no unfair advantage from the possession of this natural monopoly.

There is another suggestion I observe in the Case and Argument on the part of Great Britain. These meritorious grounds upon which the title of the United States depends are, of course, perceived by the other side, and they seek to find something of a similar nature upon which to support their alleged right. What have they? I have discovered two things which they put forward or suggest. They recognize the natural advantage which the owners of the Islands have, owing to the seals submitting themselves fully to the power of man there and the thing they put against that in this: They say this seal has *two habitats*. One is on these islands and the other is in the *sea* along the coast of British Columbia. That is they seek to attach the seals to British territory, Canadian territory, and say that they have a superior right also grounded upon favorable conditions of locality, etc.

That does not amount to enough to talk about. It is not an advantage which enables them to deal with the seals in any different way. They still cannot take them in any other way than by this indiscriminate pursuit which sacrifices males and females alike — or females to a larger extent than males. It does not enable them to practice a husbandry in respect to the animal, and to give to mankind the benefit of the increase without destroying the stock; and so it should be dismissed, even if it were true in fact. It is not true in fact. It is only a conjecture. The seal has no winter *habitat*. He is on the move all the time; if he has a habitat along the coast of British Columbia, he has the same habitat along the coast of California and Oregon, which is territory of the United States, and along a vast extent of this southern part of Alaskan territory and of the Aleutian Chain. A winter habitat along the coast of British Columbia, if it were anything but an imagination, is too slight to form any figure in this discussion.

What is the other ground of merit? That is rather more singular, as it seems to me. They say the seals consume along the shore of British Columbia a great many fish in the sea. The suggestion is, I suppose, that if the seals did not consume those fish, the inhabitants of those shores would catch them and that, therefore, the seals take away those fish from them! In other words the intimation is: "We feed these seals with our fish!" All I have to say in reply to that is that the fish which they consume, these squids, and crustaceans and cods, and what not, which these seals take are not the property of Canada, or of Great Britain. They are the property of mankind. Mankind feeds these seals. It is from mankind that they get their sustenance. They take it

out of the illimitable stores of the sea. It is not the property of any nation, but of mankind. I grant you that the circumstance that mankind feeds these seals with its fish is a circumstance tending to give mankind an interest in the product. The seals in a beneficial sense belong to mankind, That is our position; and we give them to mankind; and mankind works out its true and beneficial title only by employing the agency and the instrumentality of the United States. That is the only way whereby mankind can reach, or ought to reach them. The world says to the United States is: "You have, by nature, this extraordinary advantage of locality, *and possession*. You have the ability to take the whole annual increase of this animal and furnish it to the world if you will only cultivate it. It is your duty to do so, and when you do that, *we* get the benefit of these seals, and we get it in the only way which it can be afforded to us. Therefore, the argument that the fish which these seals consume are fish belonging to British Columbia and that, therefore, the inhabitants of that region have an equity of a superior character in the seal entirely disappears. There is neither fact nor reason to support it.

In reaching these conclusions as to property in seals, it will be observed that I rely on no disputed facts; upon no facts which are in serious dispute. I have said so at least. My assertion in that particular may not be accepted; but I feel quite sure that when the members of this Tribunal come to consider the facts, they will agree that all the facts I rely upon, are placed beyond dispute. They are conceded, or placed beyond dispute by the evidence; but I could really make the whole argument upon a much narrower ground of fact and keep myself within what is absolutely indisputable.

Here is the report of the joint Commissioners; it will be found at page 309 of the Case of the United States, and contains the following:

5. We are in thorough agreement that for industrial as well as for other obvious reasons it is incumbent upon all nations, and particularly upon those having direct commercial interests in fur-seals, to provide for their proper protection and preservation.

6. Our joint and several investigations have led us to certain conclusions, in the first place, in regard to the facts of seal life, including both the existing conditions and their causes; and in the second place, in regard to such remedies as may be necessary to secure the fur-seal against depletion or commercial extermination.

7. We find that since the Alaska purchase a marked diminution in the number of seals on and habitually resorting to the Pribilof Islands has taken place; that it has been cumulative in effect, and that it is the result of excessive killing by man.

The President. Is that in accordance with what you have said?

I think you stated that diminution has been taking place since 1884 or at least since the Alaska purchase, which was in 1867.

Mr. Carter. This report does not state any diminution at successive periods; nor does it state the beginning of the diminution.

The President. Your statement I believe is that the draft of one hundred thousand seals a year would not affect the condition of the herd?

Mr. Carter. That is my statement.

The President. That draft was observed for several years after the Alaska purchase.

Mr. Carter. Yes. It will be observed that there was a prodigious taking just prior to the establishment of regulations by the United States which diminished the numbers of the herd a great deal. That diminution began then in 1869; but unless that had been increased by pelagic sealing I have no doubt that the draft of one hundred thousand a year could be maintained. But I take the statement of these Commissioners that "since the Alaska purchase a marked diminution in the number of seals on and habitually resorting to the Pribylof Islands has taken place; that it has been cumulative in its effect and that it is the result of excessive killing by man." I take that finding to mean this: That this herd of seals is at the present time in the course of extermination, and that that extermination is due to killing by the hand of man. I take those two facts and that is all that is necessary for the purpose of establishing a full foundation for the property argument.

It follows from that fact that fur-seals must perish unless their killing is *regulated*; and it follows from that that all *unregulated* killing is *wrong*. It follows, I say, from that that the extermination of the seals which is in progress is due to *unregulated* killing. I do not say now *where* unregulated. It follows that all *unregulated* killing is wrong, because it leads to destruction. We know that there is a mode of killing by which the race can be preserved and that is by confining it to the Pribylof Islands; and we know that sealing upon the high seas cannot be regulated. All unregulated sealing is wrong. Sealing upon the high seas is, and must be, *unregulated*, because no discrimination is possible between the stock and the increase; and, more than that, the attack of the pelagic sealers is principally *upon the stock*, and *not* upon the increase, for wherever a single female is killed the stock is struck directly.

Therefore, standing upon the mere finding of this joint report there is fact enough upon which all the conclusions of my argument may be sustained.

There are some technical objections that are urged against the award of property. It is said, you cannot identify these seals.

The seals found upon the Pribilof Islands may perhaps come from the Commander Islands. As I have already said, that is founded upon conjecture. In dealing with a large subject like this the mere possible circumstance that there might be a few individuals intermingling is of no consequence at all. No judicial Tribunal would take notice of it at all. The great fact is obvious, and I think admitted, that the great bulk of the herd which goes on the Northwest Coast of America and between the Pribilof Islands and the state of California has its breeding place at the Pribilof Islands; and every individual of it at sometime or other, visits those islands and submits itself to the power of man there.

There is another thing that is suggested and that is if a property right should be allowed in these animals to the United States it might interfere and prevent the enjoyment by the Indians along the coast of an immemorial right and privilege of theirs to hunt seals for their own purposes. That right of the Indians, such as it is, deserves very respectful consideration. It stands upon something in the nature of moral grounds, I admit. They have something of a better claim than these pelagic sealers. There is some reason for saying that you should not deprive these Indians who have lived along that coast always and who have from time immemorial supported themselves to a greater or less extent by going out in their canoes in the sea and spearing these seals, of that mode of sustaining existence. It might subject them to starvation. You must support them at least if you do deprive them of it. The force of these considerations I have no disposition to disguise. But what is the nature of that case. That is a pursuit of the animals, not for the purpose of commerce, but by barbarians — for they are such — for their own existence. It is a pursuit which of itself makes an insignificant attack upon the herd. It is a pursuit which, considering the magnitude of that herd and the size which it would reach if left to its natural enemies — it is a pursuit which I have classified and consider among the natural enemies of the herd just as much as the killer whale. It is insignificant in amount. It does not affect the size of the herd; it does not affect any of the conditions which I have considered as necessary for the preservation of the existence of the herd. It is, therefore, a pursuit which might be tolerated without danger to the herd.

Therefore, it is quite possible that the United States should have a property interest in the seals, subject, however, to the right of the Indians to pursue them in the manner in which they were accustomed to so in former times; that is to say, for their own purposes, and in canoes from the shore. That is a barbaric pursuit. That is an instance which with the Government of the

United States is quite familiar, of the survival of barbaric conditions down into civilized life. It is a condition with which the Government of Great Britain is also perfectly familiar, for it has to deal with it in many quarters of the globe. So long as the Indians exist, and until they are provided with other means of subsistence, they should be allowed to pursue their natural means of subsistence; and this is one. It is not one which would threaten or endanger the existence of the seals at all; and it cannot be supposed that the United States would ever undertake to interfere with these Indians so as to deprive them of their rights.

But there is one limitation to that. This is a survival of barbaric conditions. It is a barbaric pursuit, and being a barbaric pursuit, does not endanger the existence of the herd, because it is not carried to sufficient extent. There is not a population sufficient dependent upon it; but it will not do, under cover of that pursuit, to allow civilization to take the herds of fur-seal. It will not do to employ these Indians and man large vessels with them upon the high seas, there to attack these seals for the purpose of furnishing them to commerce. That is not a dealing of barbaric nations with seals.

That is a dealing of civilized nations with seals. Barbaric nations have rights which civilized nations have not, in certain particulars. As I have said many times in the course of my argument, the attack by barbarians upon the fruits of the earth is limited, confined, and generally not destructive; but when civilization makes its attack upon them, its methods are perfectly destructive, unless those appliances are made use of which civilization supplies, and by which that destruction may be avoided. Therefore there is no difficulty in awarding to the United States a right of property subject to the right of the Indians to capture in the manner in which they were formerly accustomed to do before the use of vessels for pelagic sealing, but not to the right to go out in pelagic sealing vessels.

The President. Do you not think it is very difficult to draw a legal line of limitation between what an Indian is allowed to do for himself, and what he may be allowed or permitted to do in the service of an European or civilized man?

Mr. Carter. There are always practical difficulties connected with the dealings with barbaric tribes. There are always greater or less difficulties; but there are no insuperable difficulties connected with it.

The President. Do you find there is a substantial legal difference between the two cases?

Mr. Carter. There is a substantial difference.

The President. Between the case of an Indian fishing on his own account and an Indian fishing on the account of a civilized man?

Mr. Carter. I think there is a very substantial one.

The President. A substantial legal difference?

Mr. Carter. Yes; I think so. When I speak of legal, I mean moral or international grounds. There is no sharp distinction.

The President. Moral and international are two different fields of discussion, I think, though they may often join.

Mr. Carter. Not so different as may be supposed.

The President. They are not contrary.

Mr. Carter. Not so different as may be supposed. International law rests upon natural law, and natural law is all moral. The law of nature is all moral; and it is a great part of international law. If the dictates of the law of nature are not repelled by any actual usage of men, then they must be allowed to have their effect, and the dictates of the law of nature are the dictates of international law. To say that they are moral does not distinguish them at all from such as are legal. We have sharp distinctions, of course, in municipal law between what is moral and what is legal, but in international law whatever relates to actual human concerns, the property of nations, and actual affairs, whatever is dictated in respect to these by the law of nature, is not only the moral law, but the legal law also.

There is the broadest sort of difference between the two cases. The Indian goes out and attacks and kills the seals for the purpose of sustaining himself, making a skin which he is going to wear, and getting food to eat.

Lord Hannen. Is it to be confined to merely their sustenance? Were they not the only suppliers of the skins in the first instance? They bartered the skins, for there was no other source until the Pribylof Islands were discovered. That trading so frequently referred to was a trading in these, amongst other skins.

Mr. Carter. That is true; they were original traders. They were made use of for the purposes of commerce. But that was commerce.

Lord Hannen. Yes; carried on by the natives.

Mr. Carter. But it was commerce. They were supplying the commerce of the world. They were not furnishing themselves with clothing. They were not furnishing themselves with seals for food.

The President. That you consider was allowed at the time, and would not be allowed now.

Mr. Carter. Before the Russians discovered these regions, they were inhabited by Indians, and those Indians did pursue the

seals in that way. That is pursuit by barbarians without method; without making any effort to preserve the stock, destructive, of course, in its character, but not of sufficient extent to endanger the existence of the race of the animal. As I have said, it is only when the world makes its attack through commerce that the existence of the race of animals is in danger. It is only then. When that begins, then the danger begins. Of course at the first beginning of it, when the Russians discovered this country, and traded with these Indians and got these skins, that was the beginning of an attack by the world generally upon this stock of seals. That was the beginning of an attack by civilization through commerce, which is its great instrumentality. Of course, at that very early period, when the draft was very small, it did not threaten the existence of the stock at all; but by and by it did.

When the existence of the stock is threatened, what are you to do? That is the question.

The President. That is a point of fact which may create a difference in right, according to your view?

Mr. Carter. The distinction which I mean to draw is between a resort to a pursuit of these seals for the purposes of personal use of the people, such as they were in the habit of making before they were discovered by civilized man for the purpose of supplying the world with these skins. That is the distinction. The first pursuit, which is confined to the barbarian, is not destructive of the stock. Nor is the other, as long as it is limited to certain very narrow proportions and conditions; but when it is increased, then it does threaten the stock. What must you do then? You must adopt those measures which are necessary to preserve the stock. And what are the measures which society always employs for that purpose? I have detailed them already. It is by awarding the institution of property. Must society withhold its effort? Must it forbear to employ those agencies because here are a few hundred Indians in existence who may have some rights in reference to them? No; they are not to be considered, surely. We cannot allow this herd of seals to be extinguished just for the purpose of accommodating a few hundred Indians upon that coast. Surely not.

The President. It may be that the civilized fishermen are not more than a few hundreds also. The number of men employed is not absolutely a foundation of legal discrimination or legal difference?

Mr. Carter. You mean that those that are employed on the Pribylof Islands are a few hundreds?

The President. No; I mean pelagic sealing may be carried on by a few hundred or a few thousand Indians; but that is another

matter. The difference you make is whether they are Indians or civilized?

Mr. Carter. Yes.

The President. Suppose the Indians engage in commerce also, selling or bartering the skins. You would allow that also?

Mr. Carter. When it is not destructive.

The President. It is a question of proportion, a question of measure, with you?

Mr. Carter. If it is destructive, then it is not to be allowed. They have no right to destroy this race of animals.

The President. In order to give you satisfaction, the question would be to know what limits the pelagic sealing may be carried to without being destructive?

Mr. Carter. Yes; that is practically the question; if you can say that pelagic sealing can be carried on without being destructive.

The President. By Indians, at any rate?

Mr. Carter. By Indians in their canoes, in the way in which it was originally carried on. That does not threaten the existence of the herd.

The President. That is a natural limitation.

Mr. Carter. It is possible to do this. It would be possible for the people, now engaged in pelagic sealing, for instance to say: The Indians are permitted to engage in pelagic sealing. We are prevented from doing it. We will just employ these Indians.

The President. That is the difficult point. It was the point I just hinted at.

Mr. Carter. Yes; they might say, "We will employ those Indians. We will employ them to do the work which we are prohibited from doing." The Indians are perfect sealers. They can destroy this race as quickly as anybody else, if you hire them to go out there as pelagic sealers. I assume that cannot be done. The principles, the grounds and reasons, upon which I rest the right of property of the United States, proceed upon the assumption that the blessings of Providence are to be preserved and made continually useful to man; and whatever the mode of attack which is made upon them which is in violation of that principle must be suppressed.

Senator Morgan. If you will allow me, Mr. Carter, I understand your position to be this, and if I am mistaken I hope you will correct me: that the United States Government, being the owner of these seals, has a right to make an indulgence, an exception, in favor of those Indian tribes because of their dependent condition, so long as they conduct that sealing in accordance with their original customs?

Mr. Carter. Yes

Senator Morgan. I wish to suggest that both Great Britain and Canada and the United States have found it necessary, in order to establish and promote agriculture, commerce, the peace of the whole country, in respect to the Indian tribes, to deprive them, at their will, of all of what are called their natural rights of hunting and wandering — their nomadic wanderings — and confine them to reservations. All of these countries have found it absolutely necessary to do so, until it is a matter of universally admitted law throughout the continent of North America, until you get to Mexico, at least — and even in Mexico — that the Indians shall be dealt with in such way as the supreme power chooses to do in their general public policies, giving them in the United States, and doubtless in Canada, when they are tried in the courts, the privileges and benefits of the provisions of the constitution, which operate in favor of personal rights of liberty, property, etc; but neither of these Governments has ever hesitated, on any occasion since they have had power to enforce their laws against the Indians, to confine them to reservations, cut them off from hunting on the plains the wild buffalo, the deer and all other wild game, and absolutely to enclose them within bounds, which they are not permitted to go beyond at all.

Mr. Carter. Oh yes; that is perfectly well established in the practice of nations.

The President. Is it in Canada?

Mr. Carter. I do not know how it is in Canada.

Mr. Tupper. Since the President refers to me, I will say that there is a distinction in all those cases. For instance, on the plain, where the Government, representing the Crown, makes this arrangement by and with the consent of the various tribes, they come then under treaty rights made with the Crown. They have certain privileges, and coming under the direction of the Crown, they submit themselves to the care of the Government. The Government provides for them, giving them their rations and supplies; and for the sake of those and for the support, they submit themselves to the regulations under the Government. But on the Pacific coast the Indians are practically as free as the whites.

Senator Morgan. I speak, Mr. President, if you will allow me to explain my statements, of the power exercised. If it is exercised in a single instance by Canada or the United States, of course the whole power is necessarily implied. When we speak of a treaty with an Indian tribe, we do not speak in the sense of treating or making an engagement with a foreign government or foreign power. The Indians are entirely within the limits and dominion of the respective governments in America. A treaty that is spoken of is a mere agreement for the purpose of

pacifying them, and not based upon the idea that they have any sovereign right to treat at all. They are the subjects of the general local government, and more particularly so, I think, than can be found any where else in the world. That is the universal history of the North American continent. In the decisions in the United States, the Indians are called the wards of the nations; and the United States are their guardian.

Sir John Thompson. I might say, in addition to what Mr. Tupper has said, that the only penalty for roaming contrary to the provisions of the treaty is the withholding of the benefits of the treaty from the Indians. There is no law in any part of the country to prevent an Indian going where he pleases. In justice to Mr. Carter's position, perhaps I ought to add this: that in establishing close seasons for fishing and hunting, the Indian is included as well as the white; but an exception is made in favor of such as may take by fishing and hunting for his own sustenance.

Mr. Carter. The survival of barbaric conditions in civilized life is a perfectly familiar problem, both to Great Britain and the United States, in many parts of the world. It presents its difficulties, no doubt. They are dealt with as they can best be dealt with. It has been stated, and sometimes with truth, that at times cruelty has been shown to the native inhabitants, and that at other times perhaps too much generosity is shown to them. The problem is a difficult one; but the difficulty does not dispense with the necessity of a proper dealing with it. How was it to be dealt with? Here were thousands and thousands of Indians in the western part of the United States, living upon the buffalo, living upon herds of buffalo that roamed over a boundless area of territory; and here was a vast population pressing in that direction all the time. What are you to do? Are you to station an army along the boundary, along the frontier, and say that civilization shall not go on beyond this point? Are you to protect these Indians and the buffalo in their wild condition forever, and say that this part of the fruitful earth shall remain forever a forest and a waste? Is that what you are to do? Is that the dictate of civilization? No; you cannot do it if you would. Civilization will press forward and will drive out the Indian in some way or other. The only thing you can do is to deal with them gently and gradually, and protect the barbarian from violence and secure him a subsistence as best you can.

Lord Hannen. Was there ever any law in the United States for the preservation of the bison except in the Yellowstone Park?

Mr. Carter. No; none that I am aware of. I think not.

Senator Morgan. No; there never was any law of that sort except in that park.

Mr. Carter. No; none of that kind. The consequence was

that the United States in dealing with that problem did it by treaty; but what are treaties between a powerful nation and these tribes of Indians? They are not capable of giving consent. They do not deserve the name of treaties. They are called so; but what is the effect of them? You take away from the Indian his hunting ground. You have to support him by giving him rations; and I suppose the same thing is done in Canada. That is what it comes to. They occupy territory which is fitted to produce prodigious quantities of wheat.

That earth must be cultivated. The Indian will not do it. If you take it from them, what do you do? You give them rations. That is what they do in Canada. That is what they do in the United States. That is what they do wherever this problem of dealing with barbaric tribes is treated with generosity and with justice; but the march of civilization, the interests of civilization and the demands of civilization cannot be made to wait upon the destinies or demands of these few barbarians. That cannot be done; and when the question comes whether they are to be permitted to exterminate a race of animals like the seal, not for the purpose of supplying themselves, but because they are the employés of men who are prohibited from doing it, of course you must prohibit them as well.

The President. That is their livelihood also?

Mr. Carter. The livelihood of the Indians. They have a right to pursue their livelihood as long as it is confined to getting the seal for the purpose of clothing for their bodies or for meat; but when they want to engage in commerce and clothe themselves in broad cloth and fill themselves with rum in addition to their original wants, a different problem is presented.

But practically it would be of no account. The only way in which they pursue, or ever have pursued the seals is in single boats, going out from the shore. They can take a few seals that approach the shore rather more closely. The pelagic sealing that threatens the existence of the herd, consists in a large vessel provided with perhaps a dozen or fifteen or more boats and a very large crew, that follows the seals off at sea it may be hundreds of miles, capable of standing any weather and continuing on the sea for months. It follows them up, puts out its boats wherever it sees a number sufficient to engage attention, and slaughters them in that way. That is what threatens the existence of the herd. If sealing in boats from the shore were permitted, probably it would never occasion any serious danger. No boat can go out, of course, and stay over night. They cannot go more than a few miles, because they must come back again before dark. It is but a few seals they can take; and that does not threaten the existence of the herd.

The attack which civilization makes upon it, and which it has no right to make in a destructive way, is this sealing by vessels with crews and boats which go on long voyages. It is that which is destructive. The answer to this suggestion of the right of the Indians to make their attack upon the seals is this; that it does not create any serious practical difficulty in relation to the problem. Of course it is not to be supposed that the United States are going to take away from that people their means of subsistence, at least without supplying them in turn. Their history abundantly repels any suggestion of that sort. They have never inflicted any such barbarity upon them. Their right might be declared to be subject to that of the Indians.

The President. Is the sealing on the coast carried on by Indians from the United States or only by Indians from Canada?

Mr. Carter. There is no sealing by boats on the coast from the American territory, I think; because there are no Indians, I think, on American soil who are given to that pursuit.

Mr. Justice Harlan. When you speak of boats you mean canoes?

The President. Yes; I understand that.

Mr. Carter. I am told there is one tribe of Indians, at least, the Makah Indians, who are on American territory, who do practice sealing in boats to a greater or less extent. There may be others.

Let me say in concluding my argument upon this question of property — and I am about to conclude it now, that I have endeavored to put the case of the Government of the United States upon no selfish reasons or grounds, none personal to themselves, but upon grounds which interest alike the whole world. I have not put this property in seals as the peculiar property of the United States, in the selfish sense of property, but as a property in which all mankind is interested; all mankind having a right to enjoy, all mankind seeking to enjoy; but absolutely limited in its enjoyment to one method, and that is by employing the instrumentality of the United States in this husbandry upon the Pribilof Islands.

The President. You do not state that it is absolute property. However, you state that it is property in the sense of article 6, do you?

Mr. Carter. It is property in the sense that they are entitled to the exclusive custody and management of it and to prevent any interference with it from any quarter; but when you say property in the sense of beneficial interest, enjoyment, then I speak of the interest of the whole world.

The President. So according to your view, in this number

five, "Has the United States any right, and if so, what right of property" property here would be qualified property.

Mr. Carter. I shall not leave that question indisposed of. It does not come up at this point in my argument; but if the learned President is disposed and will give me a distinct question—

The President. If it comes in at another time, I shall be satisfied.

Mr. Carter. It will come in time. We ask for nothing here which is not equally for the interest of all nations. We ask for nothing that is going to injure anybody. We ask only for that which enables the world to enjoy the benefits of this property; and to grant what we ask takes nothing away from anybody, not even from these pelagic sealers, except the pursuit of an occupation of doubtful profit for a few years. In the allotment between the different nations of the world, of the various advantages which the earth affords, this particular one happens to fall to the United States. It is her duty to improve it and make it productive. The performance of that duty will indeed be profitable to herself, and rightfully so; and nobody ought to grudge her that. But it will be equally advantageous to the whole world, and all she asks is for an international Tribunal, representing the whole world, to award her the privilege of doing it. She has done it in the past. She is capable of doing it in the future, if permitted to do it by the abstinence of the rest of mankind from a destructive pursuit of the animal. That is all she asks.

Assuming the right of property in this herd to be established in the United States, the next question is what right she has of defending and protecting herself in the enjoyment of that property. But, as I am to deal shortly with another aspect of the question of property, namely, with the industry that is established on the islands, irrespective of any right of property in the seals themselves, I shall postpone a discussion of the rights of protection and defence which a property interest would give until I have concluded what I have to say upon that aspect of the question which relates to the industry carried on upon the islands.

[The Tribunal thereupon took a recess.]

[The Tribunal resumed at 2.10 p. m.]

Mr. Carter. There is one extract from the Report of the British Commissioners which I intended to read in the course of my argument, showing, that a husbandry is possible with the seals, and that it is carried on on the Pribilof Islands. It is an extract

from the Report of the British Commissioners, on page 159, beyond the sections. It is a newspaper extract (reading) :

The American fur-seal had a narrow escape of sharing the fate of its southern kindred. In a paper dealing with this subject, a writer gives the following account :—

“ Early in this century the seals were almost exterminated in many of the islands in the North Pacific, and were there as ruthlessly slaughtered as they were in the Bass Straits and the New Zealand coast. The extermination was, as it were, commenced, had not Russia first and the United States afterwards leased the exclusive right of killing seals on the Pribylof Islands—a famous sealing place—to a single Company, by which means the seals were saved, as the Company had an interest in keeping up the supply of furs. ”

This single experiment, the writer states, has proved conclusively that fur-seals can be farmed as easily as sheep, and that sealing should not be thrown open without restrictions. Seals are a property the State should jealously guard. On the two Pribyloff Islands it is computed that 500 000 seals resort annually. These islands, from the value of the fur-seal, were discovered in the year 1786, when the slaughter commenced, and was prosecuted without [?] until the year 1839, when the number had been so reduced that the business threatened to be entirely destroyed within a few years.

The President. Do you know where that paper comes from?

Mr. Carter. The substance of it is a newspaper extract.

Sir Richard Webster. It is referred to in the letter on page 58.

Senator Morgan. And is a reply to a circular from the Governor of Tasmania.

The President. That is a British official — Mr. Martin — is it not? Does not the British Government endorse his views?

Sir Richard Webster. On page 154 you will find that the British Commissioner sent a circular of inquiry.

The President. But that implies no approbation of the views—it is merely for the purpose of inquiry?

Mr. Carter. It is a paper presented by the British Commissioner as having been received from persons familiar with the subject. (Reading again :)

The destruction was then stopped until 1845, when it was gradually resumed, though, instead of the indiscriminate slaughter which had before been permitted, only the young males (2 years old) were allowed to be killed. The rookeries continued to increase in size until 1857.

The President. All that is in agreement with your own contention, Mr. Carter.

Mr. Carter. The general tendency of it is in accordance with our evidence, but it must not be taken as minutely in accordance with our contention. I read these extracts for the purpose of showing the conclusions of the compiler of this information. (Reading again :)

The Company who leased the right of sealing in these islands were restricted

about the year 1860 to 50000 seal-skins annually. From 1821 to 1839, 758502 fur-seals were killed, and 372894 from 1845 to 1862. From another authority, Mr. Hittel, I find that when the United States Government took possession of the islands in 1867 several American firms took possession, and the wholesale slaughter of seals began afresh. In 1868 not less than 200000 seals were killed, and for 1869 it is said the number was not far below 300000. The United States' Government, fearing their total extinction lease the sole right of seal-fishing on these islands to one firm, restricting the allowed number to 400000. From what he had been able to lay before the Fisheries Board, no time should be lost in at once taking steps to protect the seal fisheries in Bass Straits. Wherever proper restriction has been introduced a most valuable industry has been started in connection with the seal industry, and, instead of the three years, as has been proposed by this Board, he strongly recommended five years for the close season, and if at that time the seals have increased the Government might be recommended to lease the islands, allowing only a certain number to be taken annually and on no account to allow the females to be killed.

I come now to the other branch of the question of property, namely, the property which the United States Government asserts in the *industry* carried on by them on the Pribilof Islands, irrespective of the question whether they have property in the seals or not. Supposing, for the purpose of argument, that my conclusions were not admitted that the United States have a 'property in the seals themselves, or the seal herd which frequent the Islands, they assert that they have a property interest in the industry which is there carried on of such a character that they are justified in protecting and defending it against any wrongful invasion. Now, for the purpose of the argument upon that question, I employ the same basis of fact which I have employed in discussing the question of property in the seals. And, briefly, I assume as facts those assertions, which are substantially undisputed. That this industry was established originally by Russia, and that she employed care, labor and devoted expense to its establishment, carrying thither a large number of native Aleutians from the Aleutian Islands, for the purpose of guarding the seals and carrying on the business of selecting the superfluous increase in order to supply the market; that no interference was made with Russia in the enjoyment of that industry during the entire period of her occupation, down to the time when the Islands passed into the possession of the United States; that the United States continued to carry on that industry also without interference until pelagic sealing was introduced; that the effects of that industry were in all respects beneficial, not only to the United States, but also to the whole world; and that substantially it succeeded in securing the entire annual increase of these animals and devoting it to the purposes of commerce without diminishing the stock; and that by means of this industry the stock of seals has been actually preserved. And to show the beneficial

results in that particular, we have only to compare the condition of the Pribilof Islands with that of the islands in the Southern Ocean—the Falkland Islands, and others where the race has been entirely destroyed. And I might add that it is quite possible that with the prohibition of pelagic sealing, and the establishment of similar rules and regulations over the sealing grounds of the Southern Seas for the preservation of the animals, those islands might be stocked anew, and similar advantages might be enjoyed in many parts of the world to those now produced by the industry on the Pribilof Islands. This result might be brought about and the benefit to mankind greatly increased.

The President. Do you mean that that should be a matter for international consideration, or that it should be effected by municipal laws?

Mr. Carter. If it were recognized that the seals were property, there would then be an inducement to nations holding sealing grounds, pelagic sealing being prohibited, to cause those grounds to be protected and regulations might be made for the prosecution of the industry.

The President. It might be a result of the present Arbitration.

Mr. Carter. It might be, and that is one of the circumstances which should engage the attention of the Tribunal. It is not only a question of preserving the seals which now exist, but of making the natural resources of the earth available for their possibilities. Now that industry established and carried on by Russia formerly, and now carried on by the United States is unquestionably a full and perfect right. That is not disputed. It is a lawful occupation. It interferes with the rights of no one else. It is useful to the persons who carry it on, and useful to the whole world, and it has a further utility in the sense that it preserves these races of animals and applies the benefit to mankind, while at the same time, preserving the stock. In its several aspects, therefore, it is a full and perfect right; and that right is not disputed. What is asserted against it, is, that the United States have no right to prevent other industries which come in conflict with it. It is said on the part of Great Britain: "We also have an industry in these seals and our industry is a right just as much as yours is a right." Now of course the validity of that argument rests upon the question whether it is a *right*; we are thus again brought face to face with the question whether this practice is a *right*. If it is a wrong, then of course there is no defence for it. Upon what ground can it be defended as a right? What moral reasons support it? I know of none; I hear of none suggested, I hear of no consideration in the nature of a moral right suggested as a foundation upon which that pelagic sealing

can be sustained. The only grounds I hear mentioned are two—first, that the seal is a *free swimming animal*; and, secondly, that the seas are *free*, and there is no municipal power which can restrain the pursuit which is thus carried on on the high seas. That assertion, therefore, rests upon the assumption that there is a *right to destroy any free-swimming animal* in the sea. However great a blessing, however useful that animal may be, it is said by the pelagic sealers “we have a right to destroy it, a right to pursue it, although that pursuit involves its destruction.” But they have no more right to destroy a free-swimming animal than any other animal, either by practices on the sea, or by practices on the land. If you are taking only the increase, you may have a right, but if you are destroying the race, then your right is gone. To be sure, there are many free-swimming animals in the sea — the herring, the cod, the menhaden, the mackerel — the taking of which must necessarily be indiscriminate. You cannot take them in any other way; you cannot otherwise appropriate them to the uses of mankind. Mankind must seek them in that way, or do without them. And therefore the pursuit of those animals on the high seas is right enough. And in this connection I have observed that nature, in the enormous provision which she makes, of these animals, supplies barriers against their destruction by man. But the seal is an animal which can be taken and applied to the uses of mankind without diminishing the stock, and consequently you have no right to adopt another mode of pursuit which sweeps these animals from existence.

The President. Is there no other mode regulated by usage to prevent the exhaustion of the stock? I mean are there not certain rules in regard to other species besides the seal?

Mr. Carter. I know of no other in respect to these other classes of fishes in the high seas that have been or can be applied for the purpose of preventing their destruction.

The President. Do you contend that selection confers the right of property?

Mr. Carter. Yes; where selection is possible and necessary as in the case of the seal.

The President. It is one of the bases of the right of property.

Mr. Carter. With the seal indiscriminate slaughter is destructive, and therefore not right, provided there is a mode not involving destruction by which you can select the victims for slaughter. If there are some men who, in consequence of the natural advantages they enjoy, have such a control over the animal that they can make the selection, that constitutes their right of property. Thus, the United States have indisputably the right of property in respect of the seals of the Pribilof Islands, as long

as they are on the islands. But I speak also of their right of property in them on the high seas outside their jurisdiction.

Senator Morgan. If the United States have a right of property as full as can be enjoyed, they have it on the land. Is that right lost on the high seas?

Mr. Carter. That depends upon this consideration — the fact that they have a control and possession of them on the land, and that that control and possession gives them the power of taking the entire benefit of the animal for the use of mankind without diminishing the stock is a ground why they should be awarded a property in the animal, not only while he is on land, but when he is out at sea.

Senator Morgan. My proposition is that those conditions to which you refer do establish the right of property; but does that right of property follow the migration?

Mr. Carter. After you have once established your right of property on the land, the considerations which I have adverted to, establish it on the high seas. I assert the doctrine of a qualified property in the case of animals commonly designated as wild, such as bees, wild geese, swans and deer; but although the property of man in these creatures is qualified, yet whenever they have the instinct of return as evidenced by the habit of returning — as long as that habit is preserved — the property subsists, and it subsists as well when the animals are out of the possession of the owner, as when they are in his possession.

Senator Morgan. The difficulty is in the meaning of a word. I think that when a property has been acquired in an animal or any other thing that is capable of enjoyment, in the sense in which you have presented it, the property may be lost when it is out of your possession. But while it is in your possession your property is qualified.

Mr. Carter. Oh yes; it may be lost by abandoning its home, but while the instinct of return remains, the property subsists. Now, in reference to the seal, it always retains the instinct to return.

The President. In every individual of the herd?

Mr. Carter. In every individual of the herd; that instinct is never lost. Now I say we are met face to face with the question whether this pelagic sealing is a *right* or not. There cannot be a *right* to destroy any free-swimming animal, if there is another way by which he can be taken without destruction. I next have to say that what constitutes one element of the property of the United States in the seals and of their property interest in this industry, is that they are performing a duty to mankind. They are cultivating an advantage which, in the division of the blessings

of the earth, has fallen to them. Has any nation the power of preserving this race of seals for the use of all mankind by pelagic sealing, and is there any corresponding duty on the part of any nation to prosecute pelagic sealing? None whatever; it is mere destruction.

Now the other ground on which Great Britain seeks to maintain this practice is that the seas are free. They say: "You cannot interfere on the high seas with us and our industry, which is a rightful one. That does not follow. Whether a thing is right or not depends upon its moral qualities and, not upon the ability to punish it. A great many wrong things may be done on the sea, because there is no municipal law to prevent them, but that does not give any semblance of right to such proceedings. The distinction between right and wrong is not abolished on the sea; it goes all over the world, and there is no part of the sea which is not subject to the dominion of law. Therefore, to say that "the seas are free for this practice because you cannot punish us for it", is to make an assertion that has no foundation whatever in moral or legal reason. Of course in saying that the practice of pelagic sealing is wrong, we do not insist that the United States have, for that reason alone, a right to repress it. The United States do not assume the office of redressing wrongs all over the world; but what they do say is that where their right of property in an industry is injured by an act on the high seas which is in itself a wrong, then they have a right to interfere and defend themselves against that wrong. Now there are two foundations upon which the right to this industry carried on at the Pribilof Islands is maintained by the United States, and they have quite a close resemblance to each other and yet are in certain particulars distinct. The first is that that industry is made possible in consequence of a particular natural advantage which attaches to the soil of the United States at this spot, and that that advantage consists in the fact that the race of seals regularly resort thither and spend a considerable portion of their life there, enabling man to carry on a husbandry in them. This right is therefore founded on a natural advantage peculiar to the spot, and is as much a right of the nation as any other. The other contention is that it is a *national* industry which cannot be broken up by the wrongful attacks of individuals of other nations. I call it a *national* industry for this reason; it is an industry which requires the establishment of rules and regulations for its conduct, which rules and regulations cannot be carried into effect except by the authority of a nation.

Senator Morgan. Do you apply that doctrine to all the fur fisheries in the world?

Mr. Carter. Well, I am not making that point now, but only as to the Pribilof Islands. In similar conditions I think it would apply

Senator Morgan. You mean that the seals cannot be preserved without national authority.

Mr. Carter. That is the very point; I call it a national industry because it requires national protection.

The President. You would make a difference between domesticated seals and wild seals, as between wild bees and domesticated bees? You would say that the Pribilof Island seals are domesticated seals?

Mr. Carter. Well, I have considered the question of property in the seals themselves and have done with it. I am now upon the question of the right of the United States to carry on this industry even if they had no property in the seals; and I have stated a means by which this industry can be carried on there and which makes it a rightful industry. Now, where a nation has created an industry by the aid of rules and regulations which it has established; where it has brought in a population to engage in that industry, so that the destruction of that industry would deprive them of their means of subsistence, I maintain that the citizens of another nation cannot, for their own temporary benefit, come in and break up that industry. Let me illustrate that. I may assume that there are races of fishes which regularly visit a shore. They may not be the property of the owners of that shore, they may not be the property of the nation which holds dominion over that shore; nevertheless, it is possible by making rules and regulations to create an industry in them; and when that is done there is a thing, a creation, which that nation has a right to maintain against the attacks of the people of other nations.

The President. That would create a right of protection over the species.

Mr. Carter. That is what I am arguing; it would give a right of protection; the right of protection stands upon the industry which is created. Writers upon the law of property tell us that property has many forms. Sometimes it is the right to the exclusive use and disposition of a thing; sometimes it may consist of a mere lien on a thing; sometimes it may be a right to go upon the land of another and do something there; and sometimes it is what jurists call *jura meræ facultatis*; but it a right, and in the nature of property also. Now I wish to give some illustrations which will show what I mean by the right to carry on this industry. These Pribilof Islands are one instance, and there are others. In our Case are given many instances, where people having a right of legislation have passed laws for the purpose of protecting fisheries and other industries against invasion. There are many

different instances of that sort. There are many instances where Great Britain has passed laws of that character. I proceed upon the assumption that lawful and useful industries can be created and preserved by the exercise of national authority in that way. Whether this authority is susceptible of being asserted against the citizens of other nations, or only against the citizens of the nations by which the laws were passed, is another question, but the policy is in all instances the same. Now I have instanced the Pribilof Islands. Another instance is the fisheries on the banks of Newfoundland. Great Britain asserted at an early period a right to the fisheries there, because she had established an industry which had been maintained by her subjects, who resorted thither for the purpose of catching fish. When the United States gained their independence, they claimed to share in these fisheries. They said: "We went there and established that fishery; and now, having gained our independence we have a right to share in the benefits to be derived from it". That right was denied, and the attempt to assert it was unsuccessful; but it was admitted by both parties, admitted that it was a national industry, although the United States contended that they had a right to participate in it. And there are numerous other cases where laws have been passed by Great Britain for the protection of her fisheries.

The President. Are these rights asserted now?

Mr. Carter. Well, I do not think they are practically asserted now as being a property entirely independent of other nations. But they were originally, and they tend to illustrate my argument. They illustrate the idea. The correspondence is printed in our Argument.

The President. Yes, but the exclusive right was not maintained as a right.

Mr. Carter. It was maintained as a right, and —

Mr. Phelps. The whole correspondence is in the printed Argument of the Case.

The President. Your argument goes to show that the right extends beyond the limits of the islands.

Mr. Carter. Yes; we have the right to carry on the industry upon the islands; and, having that right, when the carrying on of the industry is prevented by wrongful acts in other places, we have the right to protect ourselves by repressing those acts. Now the pearl fisheries of Ceylon are another instance, as also the coral-beds in certain parts of the world which are protected by the laws of the nations that are situated contiguous to them, and in some instances for the benefit of the citizens of those nations only. In the American Case we have referred to a great number of instances where laws have been passed to establish and preserve, govern

and regulate, fisheries and other pursuits carried on on the high seas. Now the general answer to that which Great Britain makes is, that these laws, whether the laws of sovereign states, or of their colonial dependencies, are designed to operate only on their own citizens, and are not aimed at the citizens of other nations, and that they do not, therefore, furnish any support to the assertion that they may be operative against the citizens of other nations. It is said that they are only designed to regulate the conduct of citizens of the nations by whom they are made. I am not going to go through the particular instances in which these regulations have been adopted, for it would occupy altogether too much time. In general, I suppose that though these regulations were drawn in terms limited to the citizens of the nations by whom they are passed, yet in reality they are designed to be operative upon citizens of all nations; otherwise they would serve only to facilitate a fuller enjoyment of the benefits of the industry by the citizens of other nations, without the competition and rivalry of the nation by whom they are passed; which I do not suppose is their intent. But there are several instances of rules and laws respecting the practice of these industries on the high seas which are admitted by the counsel for Great Britain to be operative upon the citizens of other nations. Turning to the Argument on the part of Great Britain, page 59, we find this :

It is next submitted —

That international law recognizes the right of a State to acquire certain portions of the waters of the sea and of the soil under the sea, and to include them within the territory of the State.

This affords a legitimate explanation of the cases of foreign extra-territorial fishery laws cited by the United States, quite apart from any question whether they apply to foreigners or not.

But it affords no justification for, nor are they analogous to, the Alaskan Seal Statute, as is contended by the United States.

The territory of the nation extends to low water mark; but certain portions of the sea may be added to the dominion. For example, the sea which lies *inter fauces terræ*, and, in certain exceptional cases, parts of the sea not lying *inter fauces terræ*.

The claim applies strictly to the soil under the sea. Such claim may be legitimately made to oyster beds, pearl fisheries, and coral reefs; and, in the same way, mines within the territory may be worked out under the sea below low-water mark.

Isolated portions of the high sea cannot be taken by a nation unless the bed on which they rest can be physically occupied in a manner analogous to the occupation of land.

These principles, though they explain legitimately all the examples of foreign laws dwelt on by the United States, show also that no right to, or on, so vast an area of the high sea as Behring Sea can be acquired. Nor has any such claim ever been made.

Now, we have it admitted here that it is competent to parti-

cular nations to assert a right of property in oyster-beds, pearl-fishery beds, and coral-reef beds, and to assert a right of property, although they are out on the high seas beyond the territorial three-mile limit, and to assert that right against the citizens of other nations. They are obliged to make that admission, for it is impossible to examine the various statutes which have been passed by independent states upon these particular subjects, without recognizing the fact that they are designed to apply to the citizens of all nations, and are actually enforced against the citizens of all nations. What is the assertion there? Why, that the state has, by the operation of its rules and regulations, created a national industry in respect to those fisheries, oysters, pearls, and coral, which it is justified in protecting against invasion by the citizens of other nations, although these fisheries are situate on the high seas.

The President. That does not seem to have been the contention. It was founded rather upon the right of occupation.

Mr. Carter. Well, I am going to discuss the ground upon which they put it, but they assert that there is a right to protect against the invasion of other nations products outside the three-mile limit. I know they seek to base that upon the right of property. I contend that a nation has a right to establish an industry of that sort and protect it against the invasion of other nations. They undertake to place a limitation upon it, and to suggest reasons upon which the right is founded. I am going to inquire into the validity of these reasons. They say it is a *property* right to the *bottom*, and that it exists wherever the bottom may be *occupied*, and does not exist where the bottom cannot be occupied. Well, that amounts to this, then, that wherever a nation *can occupy the bottom*, although outside the territorial limits, it may rightfully occupy it and exclude other nations from it. How can you occupy the bottom of the sea? Well, you can occupy it only by taking such possession as is possible. You can buoy it where you can reach the bottom, and establish a force and exclude the citizens of other nations from it; and that is all the occupation of the bottom that you can effect. The assertion, then, on the part of my learned friends is, that wherever you can take such possession of the *bottom*, you can exclude other nations from it. Now that goes much further than the Argument of the United States, no part of which goes to support a general right to occupy the sea outside the three-mile limit. We do not assert any such right, nor do we suppose that any such right exists; but that is their assertion; and if it be true, you can take possession of the bottom of the sea anywhere; and if there is any particular piece of coast off Great Britain twenty miles away where the bottom can be easily reached, and which is a particularly

favorable place for carrying on a cod fishery or a herring fishery, you can take possession of it and exclude the rest of mankind from it. If this bottom theory, upon which they put themselves, has any validity or foundation, you can do that. If the right to establish the industry rest upon an ability to occupy the bottom, then you can establish one wherever you can reach bottom; and if you can establish it in one place, you can establish it in another. I do not suppose it is possible to defend any right like that over the high seas. I do not suppose it is possible to defend any such right as that over the fisheries of the seas. There must be some other principle that may be called into play.

These regulations are found in the cases of oyster beds, coral beds, beds where the pearl fishery is carried on, beds which are found in a certain proximity to the coast of a country, and which can be worked more conveniently by the citizens of that country than any other.

We find in practice that the industries are confined to such instances, and in those instances we find rules and regulations passed for the purpose of securing the products of the seas, and designed to make them more useful. Those are the cases in which it can be done, and in those cases it is perfectly justifiable. It is where there is a natural advantage, within a certain proximity to the coast of a particular nation, which it can turn to account better than the citizens of any other nation, and in respect to which it enjoys peculiar advantages growing out of its proximity, and where, if it is permitted to establish and carry out a system of national regulation, it may furnish a regular, constant supply of a certain product of the seas, for the uses of mankind; which product, if it were thrown open to the whole world, would be destroyed. That is reasonable. That stands upon the principles which I have been asserting. That is a solid foundation; but it does not rest upon any notion of a right of occupying the bottom. It rests upon the fact that here is a natural advantage, a peculiar locality offering particular advantages, which, if improved, will lead to the prosecution of a useful and profitable industry, useful to the nation, and useful to the world.

Under those circumstances, if one nation is permitted to cultivate undisturbed that natural advantage, free from the invasion of others, that industry can be profitably carried on, but if all come in, it is broken up. In such cases, therefore, the nation which enjoys this advantage says to other nations, rightfully: "Here is an advantage which Providence has placed within our reach, rather than in yours. We can turn it to account; you cannot. We can use it so that it may produce its natural advantages. In order to do that, it requires regulation. It must not be used at

all times. It must be allowed certain periods of rest. The animals which form the basis of it are at one time of the year breeding, and should not be disturbed: There are times when the industry should be pursued; times when the industry should be closed. All that cannot be accomplished without national regulation. We have done that. We have created an industry. There is a particular population of ours devoted to the work. Now, you must let us do it. It is not reasonable, it is not fair, it is not just, that you should come in here after we have created this advantage and despoil it, for a mere temporary gain. You will not come habitually; you will only come occasionally; and you will interfere only for the purpose of ruining us, without doing any advantage to yourselves."

Senator Morgan. Mr. Carter, in point of fact, are these Ceylon pearl fisheries and the coral fisheries of which you spoke held subject to the right of free navigation to commerce.

Mr. Carter. So I understand. I do not understand that commerce can be prohibited over them. Oh no; surely not. There is no occasion to prohibit commerce. It is only the regulation of the industry that is insisted upon.

So I have to say that upon conceded principles there is a right in a nation to protect an industry for which it has natural advantages, and which it can create, preserve, and improve by means of rules and regulations which it alone has the power to adopt and to enforce. It is conceded that this may be done in the cases to which I refer of the oyster beds, the pearl beds, and the coral beds, no matter how far they are out from land, wherever they are.

If they are so situated as to be the special advantage of a particular power, and that particular power chooses to improve that natural advantage by the creation of an industry, it establishes a right which it can defend from invasion by the citizens of other nations. The explanation of that which is attempted to be made in the printed argument of the other side is, that it depends upon an ability to *occupy the bottom*. That does not explain it. That furnishes no ground of reason whatever. If it were true, it would justify the occupation of a portion of the bottom in any place in the seas, irrespective of the question whether there was a natural advantage or not; and such right to occupy the bottom certainly does not exist. Nor *can* you occupy the bottom of the sea. It is not susceptible of occupation, unless the law should choose to declare that it should be deemed to be the subject of exclusive occupation; and as I have already, I think, sufficiently shown, the law will not do that merely to gratify the whim or the ambition of any particular individual, or any particular nation, but only for the accomplishment of some great social good.

That right of creating a national industry based upon peculiar natural advantages, and based sometimes upon the mere circumstance that it has been created by rules and regulations, is one that is fully established, in reference to many of several different products of the sea.

In the protecting of industries of that sort, does the nation extend its jurisdiction over those places? Does it make them a part of its territory? Certainly not. It has no right to do that. It is not consistent with the law of nations that it should do that. There is no occasion for it to do that. There is no need of it. All that it is necessary for it to do is to enforce such regulations on those places as are effective and sufficient to protect the right from invasion by the citizens of other nations.

Now let me bring the case of the seal fisheries on the Pribilof Islands before the attention of the Tribunal, and compare them with the doctrine thus established. What natural advantage have the United States, the owners of those islands? One of the highest; and an advantage, indeed, not at the bottom of the sea, but an advantage on the dry land above the sea, which is within their admitted jurisdiction. By the creation and carrying on of this industry there, they have established a business profitable to themselves, highly useful to the whole world. Shall they not be able to protect it from invasion? If the coral beds can be protected from invasion far out at sea, if the pearl beds can be protected from invasion by municipal regulations operative upon the sea, why should not this fishery be protected in the like way? It requires no greater exercise of authority. It requires no straining whatever of the ordinary rules which govern the conduct of nations in respect to their interests. It is a more illustrative instance, by far, than the case of the coral beds, or the pearl beds, or the oyster beds; a more illustrative instance for the application of the principle that the nation may protect the industry which has thus been created.

To make it entirely analogous, if these seals were in some manner attached to the bottom, if they were in the habit of congregating at some particular place on the bottom of the sea, then, according to the doctrine which seems to be made the foundation of the right by our friends on the other side, the United States would have a right to go out and take possession of that bottom, incorporate it into its own territory, and treat it as a part of its own nationality.

I am sure we assert no such right as that. We do not ask to go to any such length as that. All we ask is the right to carry on the industry on our own admitted soil, and to protect it from being broken up by repressing acts upon the high seas which are in themselves essential wrongs.

Let me defend these particular instances of the coral beds, the pearl beds, and the oyster beds upon the same principles upon which I have defended the assertion of property interest, not only in the seals, but in the seal industry upon the Pribilof Islands. In all these cases, there is a peculiar natural advantage connected with those places and belonging to the nations which lie in nearest proximity to the places where they are situated. In the next place, they are exhaustible. There is not enough for all; and therefore there arises an occasion when you may assert the principles which govern the laws of property. In the next place, if left open to the unregulated invasion of the citizens of all nations, they would be used up and destroyed. The only condition upon which they can be preserved and made beneficial to mankind is that they be allowed to be worked and operated by the particular power which has the best facilities for that purpose. In the next place, they can be preserved only by putting them under a system of regulation, which shall be operative upon the citizens of that as well as of other nations. It is necessary that the citizens of the particular power, whose citizens go out there and improve and occupy these places, should be also made subject to these regulations. In other words, the general condition is presented that mankind may have the benefit of these advantages if they are disposed of in this way, and not otherwise; and, consequently, they ought to be disposed of in this way. The bottom of the sea in these places is not made the property of the particular powers who assert the right to the industries. It is not their property at all. It is not within their sovereign jurisdiction at all, any more than any other part of the high seas, but it is a theatre where their defensive regulations may be put in operation, and where the rights of their citizens may be defended.

Let me support these views by a reference to the opinions of the best writers. I read from Puffendorf on the Law of Nature and Nations. The extract is found on page 134 of my argument :

As for fishing, though it hath much more abundant subject in the sea than in lakes or rivers, yet 'tis manifest that it may in part be exhausted, and that if all nations should desire such right and liberty near the coast of any particular country, that country must be very much prejudiced in this respect; especially since 'tis very usual that some particular kind of fish, or perhaps some more precious commodity, as pearls, coral, amber, or the like, are to be found only in one part of the sea, and that of no considerable extent. In this case there is no reason why the borderers should not rather challenge to themselves this happiness of a wealthy shore or sea than those who are seated at a distance from it.

And then Vattel, upon the same subject, says :

The various uses of the sea near the coasts render it very susceptible of

property. It furnishes fish, shells, pearls, amber, etc.; now in all these respects its use is not inexhaustible. Wherefore, the nation to whom the coasts belong may appropriate to themselves and convert to their own profit, an advantage which nature has so placed within their reach as to enable them conveniently to take possession of it, in the same manner as they possess themselves of the dominion of the land they inhabit. Who can doubt that the pearl fisheries of Bahrem and Ceylon may lawfully become property? And though where the catching of fish is the only object, the fishery appears less liable to be exhausted, yet if a nation have on their coasts a particular fishery of a profitable nature, and of which they may become masters, shall they not be permitted to appropriate to themselves that bounteous gift of nature as an appendage to the country they possess, and to reserve to themselves the great advantages which their commerce may thence derive, in case there be a sufficient abundance of fish to furnish the neighboring nations?

(Sec. 2) A nation may appropriate to herself those things of which the free and common use would be prejudicial or dangerous to her. This is a second reason for which governments extend their dominion over the sea along their coasts, as far as they are able to protect their right.

Now, upon that very firm basis of reason and authority we place the right of the United States to protect themselves in the enjoyment of the industry which they have established upon these islands. They have peculiar advantages, supreme advantages, for appropriating the annual increase of the seal, without diminishing the stock. They have established an industry and made rules and regulations which are devised to preserve it, and to make this blessing perpetual to mankind. The seal is exhaustible. There is not enough for all, and they are entitled to challenge for themselves the benefits of this industry in consequence of these advantages, and in consequence of the steps which they have taken to improve them.

I cannot think that there is any sound answer to an assertion of the right of a property interest in this industry placed upon that basis, and this, too, irrespective of a property in the seals themselves.

That concludes my argument upon this question of the property interest of the United States in the industry established upon the islands, irrespective of a property interest in the seals.

I now pass to the consequences of the establishment of those rights, so far as they involve the question, what acts the United States may do for the purpose of protecting themselves in the enjoyment of the rights thus acquired and established.

I must assume, in the first place, that if she has the right to the exclusive enjoyment of this industry of taking seals, in consequence of her natural advantages and of the exhaustible character of the product, she has the authority in some manner to enforce that right. Otherwise we should be talking to no purpose. What is a right which there is no means of enforcing? It would be mere words.

It amounts to nothing at all. There is nothing substantial about it. Such things are not the subject of discussion. When it is said that a man or a nation has certain rights of property, it means that they have some rights which can be enforced in some manner. *How* shall they enforce them? That is the question. What acts may the United States do? Can they extend their sovereignty over the seas to an illimitable extent wherever it may be necessary to protect the right? No; they cannot. We make no assertion of that sort. We could not substantiate it, if we did. The sovereign jurisdiction of a nation, is bounded by her territory, with an addition which carries, to a certain qualified extent, her sovereignty over a distance on the seas commonly taken as three miles. Beyond that the sovereign jurisdiction of the nation cannot be extended. Beyond that her laws, as laws, have no force or operation. Beyond that, her powers as a legislative power have no effect. The emanations of her legislative power do not extend as exercises of legislative power beyond her territorial jurisdiction. All that we take to be admitted.

Sir Charles Russell. You mean as against those who are not subjects or citizens?

Mr. Carter. Yes; against those who are not subjects or citizens. That is what I mean. If her legislative power extended over the sea, she would have a right, of course, to legislate for everybody that came within the limits of that legislative power. We make no such pretension as that. This supreme legislative jurisdiction must be bounded necessarily by some line, and that line is, for the boundary of her absolute legislative jurisdiction, high-water mark. It does not go beyond that, although she may extend it, for most purposes, over a further space which is commonly taken to be—I do not mean to say it is absolutely limited to that, but is commonly taken to be—a distance of three miles; but even there her legislative power is not absolute, for she cannot exclude the passage of foreign vessels over her waters. She cannot, as she can do with regard to her territory, exclude foreigners from it. Over the land she has an absolute power of exclusion; but over these territorial waters, although she may generally extend her legislative power, she cannot extend it so far as to exclude foreign ships from them. Her right to protect her property or industry is not derived from her legislative power. Where do you get it then? How does she acquire any right to protect it? She has a right to protect it, just as any individual has a right to protect his property, where there are no other means, that is, by force; not by the exercise of legislative power, but by the exercise of executive power—an exercise of natural power—by an exercise of what you may call force. Individuals can defend

their rights and property by the employment of force to a certain extent. If a man attacks me, I may resist him and subdue him and use violence upon him for that purpose; and I may go as far as it is necessary for that purpose; not farther. Whatever force it is necessary to employ to defend myself, I may employ against him. So if a man comes upon my property, I may remove him, if I have to carry him five miles; and I may employ as much force as is necessary for the purpose of removing him from my property; but I cannot employ any more force than is necessary.

Those rights of self-defence and self-protection survive to individual man even in civil society, but we may not go any farther than strict necessity. For the general protection of rights, members of a civil municipal society must appeal to society itself. They appeal to its courts for protection. They appeal to the judicial power, and that furnishes a remedy. What can nations do? Is there any court to which they can appeal? No; they cannot make any such appeal as that. There is no tribunal into which one nation can summon another nation for judgment. What can nations do? They can only use this same sort of self-defensive power that an individual does. That is all. That they can use under all circumstance, limited, however, by the same rules and by the same boundaries which limit it in the case of an individual—necessity. Whatever is necessary to be done by a nation for the protection of its rights, it may do, and it may do it as an individual, and it is no exertion of its legislative power at all.

We may make that very plain and palpable by turning to admitted instances of the exercise of it, and take for that purpose what are commonly called belligerent rights. Here is a nation engaged in war. It blockades the enemy's ports. The ship of a neutral nation, friendly to both parties, undertakes to enter that blockaded port, and the belligerent that has established the blockade captures her by an exercise of force, carries her into one of his own ports, and confiscates her, and sells her. What kind of an exercise of power is that? Not legislative power, certainly. That act was committed on the high seas, and outside of the jurisdiction of any power. It therefore was not legislative power. It did not operate to extend the jurisdiction of the nation over the place. It was simply an act of reasonable and necessary force employed for the purposes of self-defence. The nation had the right to carry on the war. Its existence, perhaps, depended upon its ability to subdue its adversary. It could not carry on the war successfully unless it had the right of shutting up the ports of the enemy, and, therefore, the necessary purposes of self-defence gave it the liberty to seize the ship of another power, carry it into port, and condemn it.

That is not legislative power. It was not exerted by reason of any extension of the sovereignty of the nation over the seas. It was simply an exercise of self-defensive power, standing upon the principle of necessity and limited by the principle of necessity. Wherever the necessity exists that power exists. I instance the case of blockade. There are other instances of belligerent rights.

The President. You would not admit of that power in times of peace?

Mr. Carter. That is another question. Whether you may exercise a power of that sort in time of peace is a question to which I shall presently come. What I am explaining now is *the character of the act*. It is not *legislative*; that is certain. It is an act of self-defensive power. There are other instances of it in the case of belligerent rights. Take contraband of war. A belligerent can capture a vessel that is carrying contraband of war, upon any of the high seas. You can enter even the territory of a friendly state, if it is necessary for the purpose of protecting yourself against your adversary; and even when there is no condition of war. They had a rebellion in Canada some years ago, and a vessel was fitted out by persons making use of the soil of the United States for the purpose of aiding the rebellion, as it was called. A British military force crossed the Niagara River, captured that vessel in the territory of the United States — not on the high seas, but in the territory of the United States.

Senator Morgan. You refer to the *Caroline*?

Mr. Carter. I refer to the case of the *Caroline*. There was a conflict between Great Britain and the United States upon the point as to whether Great Britain had the right to do that; but the conflict was not upon the point of principle at all, it being admitted on both sides that if there was a necessity for doing that act Great Britain was right in doing it; that if there was a well-grounded apprehension that that vessel was going to proceed across the river and engage in enterprises hostile to the authority of Great Britain in Canada, she was justified in doing that.

A celebrated instance in history was the seizure by Great Britain of the Danish fleet in the harbor of Copenhagen. There was a fleet of a friendly power. There was absolute peace between Great Britain and Denmark; but Great Britain was apprehensive that that fleet would fall into the possession of France, and the seizure was defended by her ablest statesmen on the ground of necessity. This necessity of nations, when it appears, must have its way; and the inconvenience, the trouble, the damage, the loss which individual citizens of another nation may occasionally suffer in consequence of these exertions of self-defensive authority, are not to be taken into account.

The President. Do you not think that all of that takes us out of this sphere of law and right?

Mr. Carter. Not at all. We are right within the sphere of law and right.

The President. I do not think the whole world generally considers it so.

Mr. Carter. We are right within the sphere of law; and the exercise of these acts of self-defensive authority — the extent to which they may go, the necessities which create them, how far the necessities extend — constitute a great chapter in international law, and are all dealt with, all their limitations defined, and the principle which governs them laid down.

What is said upon the other side. They agree that all these things may be done. What do they say? Well, they say that they cannot be done in time of *peace*, — that you cannot defend yourself by the exercise of force on the high seas in time of peace. Where, I should like to know, is such doctrine as that laid down? I hope my learned friends will find some authority for those positions. I have never been able to find such authority. The assertion is that a nation cannot defend itself by an act of necessary force in time of peace — a thing that an individual may do in civil society, a nation cannot do; and cannot do when there is no other means of protecting itself. Of course it must be instantly perceived that if this power of defending yourself and your property from injury against the citizens of other nations, is something which a nation cannot do in time of peace — if that is true — the assertion that you have any rights at all is mere empty sound. A right that cannot be defended amounts to nothing. I would like to have those who assert that a nation cannot defend itself and its property in time of peace by acts of necessary self-defence, tell me how they can defend them. I hope they will be able to tell me. If a nation cannot defend its admitted and conceded rights in that way, I hope they will be able to point out some way in which those rights can be defended and protected.

But there is no truth in the assertion that the exercise by a nation of the right of self-defence, by the employment of acts of necessary force, is confined to times of war. There is no substance in that. It exists in time of peace just as well. Whenever the necessity arises, the right arises, whether it be in time of war or time of peace. It may arise in peace just as much as in war. In point of fact the principal occasions, and the most frequent occasions, for the exercise of this right occur in times of war, and, therefore, the instances in which they are performed and the rules which govern their exercise are found in belligerent conditions far more than in conditions of peace. The absence of

the occasion is the reason why we find less discussion of these rights in time of peace, and a want of rules for regulating them; but nevertheless the occasion may arise, and when it does arise, then the power must be put in force.

Now, let me call the attention of the Tribunal to occasions when it does arise in times of peace. In the first place, let me allude to those municipal regulations which are devised by different states for the purpose of protecting their revenue. I before remarked that the protection of the revenue of a nation could not well be effective unless the conduct of vessels could be taken notice of at a greater distance than three miles from the land. If a vessel intending a breach of the revenue laws of a nation had the power to approach its shores to a distance of three miles from the land, and there wait a favorable opportunity to slip in, it might at all times evade its revenue laws, and, consequently, I suppose most nations — certainly Great Britain and the United States — Great Britain from a very early period and the United States almost from the period of her independence — have enacted laws prohibiting vessels from transshipping goods or hovering at a distance much greater than that of three miles — three or four leagues from the shore being the limit which I think is employed. What is the penalty which they denounce for that purpose? The penalty is capture and confiscation. Does that penalty, and the enforcement of that penalty involve an extension of jurisdiction out to that limit of three or four leagues? Certainly not. It is an act of self-defence. It is an executive act, designed to protect the revenue interests of the country. So also in the case of colonial trade, a similar device was formerly adopted for the purpose of preventing the approach of vessels in the neighborhood of the colonies of another country, for the purpose of engaging in illicit trade with such colonies. In order to enforce such prohibitions, it was necessary that regulations should be adopted prohibiting vessels from hovering off the coasts. Consequently, if a vessel appeared off the coast and did what was called “hover”, that is not proceed upon her voyage, but wait there apparently for a favorable time to run in, she subjected herself to the penalty of those laws, and may be confiscated and captured. I think no nation has ever resisted the enactment or enforcement of those laws.

The President. I do not think you are quite right about that.

Mr. Carter. So far as I am aware. There may have been cases where they were enforced under exceedingly unreasonable conditions; but I do not myself remember them.

The President. I believe cases of that sort have given rise to

international communication, between nations. It may be that they have led to agreements.

Mr. Carter. Of course, I will not be at all certain that such has not been the case. My acquaintance with them, I confess, has been derived mainly from the treatment of them that we find in books of international law; and when they are treated by writers of international law, they are treated as reasonable exercises of the power of self-defence, not objected to by nations, unless they were attempted to be enforced under very unreasonable circumstances. To illustrate them, I must again refer to a decision which I have alluded to once before.

This was the case where a vessel was seized in time of peace outside the three-mile limit for a violation of a regulation such as I have alluded to. It is the case of *Church v. Hubbard*. (2 Cranch U. S. Sup. Court Reports, p. 189). I read from the opinion of Mr. Chief Justice Marshall on page 181 of my argument :

That the law of nations prohibits the exercise of any act of authority over a vessel in the situation of the *Aurora* and that the seizure is, on that account, a mere maritime trespass, not within the exception, cannot be admitted. To reason from the extent of the protection a nation will afford to foreigners, to the extent of the means it may use for its own security, does not seem to be perfectly correct. It is opposed by principles which are universally acknowledged. The authority of a nation within its own territory is absolute and exclusive. The seizure of a vessel within the range of its cannon by a foreign force is an invasion of that territory, and is a hostile act which it is its duty repel. But its power to secure itself from injury may certainly be exercised to beyond the limits of its territory.

Upon this principle the right of a belligerent to search a neutral vessel on the high seas for contraband of war is universally admitted, because the belligerent has a right to prevent the injury done to himself by the assistance intended for his enemy. So, too, a nation has a right to prohibit any commerce with its colonies. Any attempt to violate the laws made to protect this right is an injury to itself which it may prevent and it has a right to use the means necessary for its prevention. These means do not appear to be limited within any certain marked boundaries, which remain the same at all times and in all situations. If they are such as unnecessarily to vex and harass foreign lawful commerce, foreign nations will resist their exercise. If they are such as are reasonable and necessary to secure their laws from violation, they will be submitted to.

In different seas and on different coasts, a wider or more contracted range in which to exercise the vigilance of the government will be assented to. Thus in the Channel, where a very great part of the commerce to and from all the north of Europe passes through a very narrow sea, the seizure of vessels on suspicion of attempting an illicit trade must necessarily be restricted to very narrow limits; but on the coast of South America, seldom frequented by vessels but for the purpose of illicit trade, the vigilance of the government may be extended somewhat further, and foreign nations submit to such regulations as are reasonable in themselves and are really necessary to secure that monopoly of colonial commerce, which is claimed by all nations holding distant possessions.

If this right be extended too far, the exercise of it will be resisted. It has occasioned long and frequent contests which have sometimes ended in open war. The English, it will be well recollected, complained of the right claimed by Spain to search their vessels on the high seas, which was carried so far that the Guarda Costas of that nation seized vessels not in the neighborhood of their coasts. This practice was the subject of long and fruitless negotiations, and at length of open war. The right of the Spaniards was supposed to be exercised unreasonably and vexatiously, but it never was contended that it could only be exercised within the range of the cannon from their batteries.

Indeed, the right given to our revenue cutters to visit vessels four leagues from our coasts, is a declaration that in the opinion of the American government no such principle as that contended for has real existence. Nothing, then, is to be drawn from the laws or the usages of nations, which gives to this part of the contract before the court the very limited construction which the plaintiff insists on, or which proves that the seizure of the *Aurora* by the Portuguese governor was an act of lawless violence.

That very extract — I think the whole of it; at all events the most substantial part of it — was quoted by Lord Chief Justice Cockburn, of England, in delivering his judgment in the very celebrated and rather recent case of the *Queen v. Kehn*. It is found in the 2nd Exchequer Reports. I do not know but my learned friends may have it in their possession. I find that I have the passage. The part to which I particularly refer will be found on page 449. Lord Chief Justice Cockburn says :

Hitherto legislation, so far as relates to foreigners in foreign ships in this part of the sea, has been confined to the maintenance of neutral rights and obligations, the prevention of breaches of the revenue and fishery laws, and, under particular circumstances, to cases of collision. In the two first, the legislation is altogether irrespective of the three mile distance, being founded on a totally different principle, viz, the right of the state to take all necessary measures for the protection of its territory and rights and the prevention of any breach of its revenue laws. This principle was well explained by Marshall, C. J. in the case of *Church v. Hubbard*.

And he then cites the passage I which have just read from that opinion.

[The Tribunal thereupon adjourned until Tuesday, April, 25, 1893.]

FIFTEENTH DAY. MAY 2ND, 1893

[The Tribunal convened pursuant to adjournment, all the Arbitrators being present.]

The President. Mr. Carter, we are ready to hear you.

Mr. Carter. Mr. President, at the last sitting of the Tribunal at which argument was heard, a question was addressed to me by the learned President in the course of my argument which I did not not at the moment precisely understand, or I should have answered it at that time. I thought it had more particular reference to the construction to be placed upon Article VII of the Treaty, and therefore said that I would postpone my answer to it until I came to treat of that article. I had been insisting that the grounds and reasons of my argument in support of the proposition that there United States had a property interest, were not drawn from considerations selfish and peculiar to the United States, but were such as interested the whole world; that the property was one in which the whole world had a beneficial interest. The question which the President addressed to me was whether that property interest was of the kind mentioned in the fifth question to be submitted under the treaty, or whether it was a qualified property interest of a different kind. I should be misunderstood if it were supposed that the asserted property interest of the United States in the seals was anything less than a full and complete property interest. The grounds upon which we support that interest do, indeed, include among other things, the common interest of mankind in the seals, which can be worked out and made available to the different nations only through the instrumentality of awarding a property interest to the United States; but that property interest, when awarded, is no respect different from a property interest held under other circumstances. It is a full and absolute property, entitled to all the protections of property, and which confers upon the owner all the rights which property under any circumstance confers. It is therefore the sort of property interest mentioned in the fifth question which is submitted under the treaty.

I now resume my argument at the point at which I left it upon the question whether, assuming that the United States *has* a prop-

erty in the seals, or a property interest in the industry which it maintains upon the Pribilof Islands, it has the right to protect that property, or that property interest, when necessary, by the employment of reasonable force on the high seas. I had supported that view by showing that it was the necessary consequence of the award of such a right; that there was no other way in which a nation could protect its rights when invaded upon the high seas except by the employment of force. I had undertaken to show that that was the universal method which nations pursued, and had illustrated my view by referring to many instances, most of them drawn from the class of belligerent rights, where force was thus employed by a nation upon the high seas to prevent any invasion of its rights.

The answer intimated to that view in a part of the argument of Great Britain is that the instances in which a nation may employ force upon the high seas to protect its rights and to capture vessels by means of the employment of force, were limited to cases of belligerency, and do not exist in time of peace. I proceeded to say that that was not the case; that although the instances were more frequent in time of war where the employment of force was resorted to, still whenever the necessity occurred, which was the sole foundation of the right, it was resorted to in peace just as much as in war. I alluded, in support of that view, to the opinion of Mr. Chief Justice Marshall of the Supreme Court of the United States in the case of *Church vs. Hubbard*, which was a case where a nation had established a regulation for the purpose of preventing an invasion of its colonial trade. The vessel of another country contemplating an enterprise of an illicit character, in violation of the exclusive right of the nation referred to in its colonial trade, was found outside of the three mile limit actually engaged, however, in an attempt to carry on this prohibited trade. She was seized, carried in, and condemned, and that condemnation was fully supported by the Supreme Court of the United States. Not only was the condemnation itself supported, but the regulation was also supported. That decision I had also occasion to say had been cited with approval, and extended citations from it read with approval by Lord Chief Justice Cockburn of the Court of Queen's Bench in England, in giving his opinion in the celebrated case of the *Queen vs Kehn*.

With the citations of those commanding authorities, I might well leave the subject. That decision in the narrowest view of it, fully sustains any employment of force by a nation in time of peace upon the high seas for the purpose of arresting and capturing a vessel which is actually engaged in an invasion of its rights. That proposition is fully supported by the decision itself; and the

propriety of regulations for the purpose of governing the exercise of that right is also supported by the language the opinion.

It is, however, true — and a distinction is to be noticed here — that regulations designed to govern the exercise of this right of self-defence sometimes go a step further than the mere making of provision for the seizure and capture of a vessel on the high seas, when she is *actually engaged* in an offence against the laws of the nation which undertakes the seizure. They sometimes go a step further than that, and make the conduct of a vessel, if it justifies a suspicion that she intends illicit or prohibited trade, or intends any other violation of the laws of a nation, itself an offence, although, in point of fact, it might be true that the vessel was not actually engaged in a violation of the laws of the nation adopting such a regulation.

When regulations of this character go to that length, they go beyond the mere right of employing force, and enter the field of legislation, and assume a limited and qualified right to make laws operative upon the high seas. That is the nature of regulations when they undertake to make acts offences which are not, in their nature, necessarily offences. If a vessel is actually engaged in an attempt to carry on a prohibited trade with the colony of a nation, that act is, necessarily, in itself a violation of the rights of that nation; but if she is not so engaged, but happens to be involved in circumstances which throw suspicion upon the nature of the enterprise in which she is engaged, and justify a suspicion that she is really contemplating a prohibited trade, if there is a regulation which makes that conduct of itself a crime, that, we must admit, is a piece of legislation, and assumes the right — a limited right, it is true — of passing laws operative upon the high seas.

All the doubt and all the controversy which have arisen in reference to this question of the exercise by a nation of the right of self-defence upon the high seas, turns upon the validity of regulations of that sort when they go beyond the mere governing of the right of self-defence and prescribing how it shall be exercised, and undertake to make distinct offences. The power of a nation to do that has been disputed, and may perhaps be still the subject of dispute. It will be observed that this exercise, even of the right of legislation in the cases which I have mentioned, does not involve an assumption of a general authority to legislate over the seas. It is limited strictly to the case of self-defence, and is calculated to provide means by which that right of self-defence may be more efficiently exerted; but, nevertheless, it does partake of the quality of legislation. Whether it is valid or not, has been disputed.

That precise question arose in the Supreme Court of the United

States in the case of *Rose vs. Himely*, which is reported in 4th Cranch, page 241. The circumstances of that case were substantially these : The French authorities had made an ordinance prohibiting vessels from sailing within two leagues of the island of San Domingo at certain places, and under certain conditions. A vessel was captured that had violated that ordinance, but the capture was made outside of the two-league limit. The question was whether that capture could be sustained, that is to say, whether a capture by one nation upon the high seas of a vessel belonging to another nation, which had been engaged in violating a municipal regulation, was lawful. Chief Justice Marshall was of opinion that it was not lawful; but a majority of the members of the court did not agree with upon him that point and so the question was passed over without being decided, the case being disposed of upon another point. It again arose for decision in the case of *Hudson vs Guestier*, 6th Cranch, 281. The case involved a violation of the same ordinance, and the capture had been made outside of the two-league limit. This case of *Hudson vs Guestier* is reported twice. It came before the Supreme Court on two occasions; and the proof upon the last occasion, which is the one to which I refer, was different as to the locality of the capture from what it was when it came before the court in the first instance. In the last instance the evidence showed that the capture had taken place outside of the two-league limit. Upon the second argument it was held by a majority of the court that the capture was lawful; and the expressions in the opinion of Mr. Chief Justice Marshall, in *Rose v. Nimely* — his dicta to the contrary effect — were overruled; and therefore, so far as the Supreme Court of the United States is concerned, it is held that regulations of the character I have mentioned, even when they go further than to merely provide for capturing a vessel that is actually engaged in a violation of the right of a nation, and constitute a prohibited area within which a vessel must not go, whether upon a rightful or a wrongful mission, are in accordance with international law.

Let me say, however, that the United States, upon this argument, avoids all controversy of that sort. We do not ask for the application of any doctrine, even although we might, to the effect that we can establish any prohibited area on the high seas and exclude the vessels of other nations from it. We do not ask to have it determined that the United States has the right to say that the offence of pelagic sealing when committed by vessels of another nation is a crime for which we can *punish* the officers and crew of such vessel. That would be legislating for the high seas. We do not ask for a decision that the United States can make a law and enforce it, by which she could condemn a vessel that had

been engaged at *some past time* in pelagic sealing, if the vessel was not so engaged at the time of seizure. We ask no right of that sort, although, under these decisions, we might. The doctrine maintained by us simply amounts to this, that whenever a vessel is caught red-handed, *flagrante delictu*, in pelagic sealing, the Government of the United States has the right to seize her and capture her; that is to say, it has the right to employ necessary force for the purpose of protecting, in the only way in which it can protect its property in the seals, or its property interest in the industry which it maintains upon the islands. That is the extent of our assertion.

If the United States cannot protect its property in that way, how is it possible for it to protect it at all. My argument assumes, of course, that I have been successful in showing that the United States have a property interest in these seals wherever they are, and, upon the high seas, as well as upon the land; or, if not that, that they have a property interest in the industry which they carry on at the Pribilof Islands, which they are entitled to protect. The practice of pelagic sealing, we have shown, is destructive of both. The United States cruiser finds a vessel actually engaged in destroying these seals, the property of the United States. She warns her off — commands her to desist from the trespass in which she is engaged. Suppose the vessel refuses, what is to be done then? Is she to allow her to proceed in the execution of her trespass, stay by her, follow her into some port, and there in the name of the United States, seek redress in the municipal tribunals?

Is she driven to that? That, of course, would be wholly ineffective, and if it were effective in any degree, or in any instance, it would require the entire Navy of the United States to carry it fully out. You would require a ship of war for every pelagic sealer. That, of course, is absolutely ineffective; nor does it comport with the dignity of a nation. No nation has ever yet deigned, in the defence and protection of its rights upon the high seas, to wait until it could resort to the municipal tribunal of some power and there seek to obtain such justice as might be afforded.

One other resort might be suggested. It might be said that the Government of the United States might make the conduct of these Canadian pelagic sealers under such circumstances the subject of complaint to Great Britain herself. What should it say to Great Britain? Ask her to prohibit this conduct? How could Great Britain prohibit it? Only by employing a part of her fleet to do it. Is it the business of one nation to furnish a force to protect the rights of another nation? Would not the prompt answer of Great Britain be under such circumstances: "This is not our act; we do not adopt it; we agree that you have a property in these

seals; we do not command, encourage, or in any manner assist, the action of these pelagic sealers; if they are trespassing upon the rights of the United States, is that nation so feeble that it cannot defend itself upon the high seas?" What answer could the United States make to such an inquiry as that?

No; there is no way in which a nation can protect its rights upon the high seas other than by the employment of force — force employed as an individual would employ it; force not derived from any law whatever, but force derived from the fact that the nation has a right upon which some one is engaged in committing a trespass, a trespass which the nation cannot prevent in any other way, except by the employment of force. Those rights, frequently asserted in time of war, are not so frequently asserted in time of peace, but only because the necessity for it does not so frequently arise. But still they are asserted, and must be asserted, whenever a nation seeks to protect with efficiency her colonial trade from invasion, or her revenue laws against smuggling by citizens of other nations; and must be asserted whenever she wishes to enforce with efficiency in time of contagion her quarantine laws — whenever, indeed, a case arises in which the rights, or the property, of a nation may be endangered by the acts of citizens of other nations upon the high seas, whether in peace or war, there is occasion for the employment of force.

Inasmuch as I wish to be precise upon this point, I have drawn up a series of propositions which embrace the views entertained and asserted by the Government of the United States upon this particular subject. And they are these :

First. The territory of a nation consists of the land within its dominion and what are commonly called its territorial waters, which embrace interior gulfs, or bays nearly enclosed by its territory, but connected with the sea by narrow straits separated by headlands, and a narrow belt of the open sea along the shore, of the width, as commonly allowed, of three miles, or a cannon shot.

Second. The exercise of the sovereign legislative power of the nation is limited to its territory as above described, except in special instances where, for reasons of necessity, a nation may exercise a limited legislative power over neighboring parts of the sea beyond the narrow belt above mentioned. Outside of the territory of the nation its laws, as laws, have, except as above mentioned, no operation or effect. The ships of a nation, however, are, even when on the high seas, deemed to be a part of its territory.

Third. Nor can a nation, with the special exception above mentioned, take any action outside of its territory for the purpose of enforcing its laws, or punishing a breach of them. Its writs, or

other processes, or orders of its courts, cannot be lawfully executed outside of its territory.

Fourth. Two sovereign nations cannot exist together upon the same land. The sovereignty of one must necessarily yield to that the other. But all sovereign nations may co-exist upon the seas. They may go and be there as individual persons upon terms of absolute equality. In legal contemplation they are there whenever the interests which they are bound to defend, such as their property, their citizens, or the property of their citizens, are there.

Fifth. In the just defence of its existence, or its rights, a nation may employ, anywhere upon the high seas, against those who attack its existence or rights, such force as may be necessary and reasonable. This is a self-evident proposition; for, inasmuch as a nation cannot prevent invasions of its rights upon the high seas by legislation, and by judicial proceedings to enforce legislation, it would be absolutely without means for protecting them, unless it had the power of necessary self-defence. Any suggestion that it might institute civil suits against trespassers in the municipal courts of other nations would be to no purpose. Such proceedings would be wholly ineffective, and would, besides, not comport with the dignity of the nation.

Sixth. The action of the officers and agents of a nation in exercising this right of necessary self-defence may, and should, be governed by rules and regulations, which may, according to the internal constitution of a nation, and the distribution of its powers, assume the form of executive instructions, or municipal laws, or rules. Neither are necessary to the exercise of the power. They serve to govern the exercise of the power which exists independently of them. In constitutional governments, where the sovereign power is distributed among different departments, such rules and regulations may be necessary. Other governments cannot insist upon them.

Seventh. In the exercise of this power of self-defence the nation is responsible to other nations whose citizens may have suffered from its exercise. If a necessity is shown for its exercise, and the limitations of such necessity have been observed, the act is justified. If otherwise, a wrong has been committed and reparation must be made.

Eighth. The capture by a belligerent nation of the vessels of a neutral power when found carrying contraband of war or engaged in running a blockade are familiar instances of the exercise of this right of self-defence. The rules derived from the practice of nations governing the exercise of such right of capture, with such other reasonable rules as the belligerent nation may prescribe,

are regulations designed to govern the conduct of the officers and agents of the belligerent and to prevent abuses of the right which would make the belligerent answerable to the neutral nation whose ships have been captured.

The prize courts which administer these rules, although proceeding according to judicial methods, are not really courts administering justice between man and man, like instance courts, but agencies for the purpose of informing the belligerent sovereign whether he ought to sustain a capture as regular and rightful, or admit it to be a wrong, for which reparation is to be made. (*Rose v. Himely*, opinion of Johnson, J., 4 Cranch, 282.)

Ninth. The notion that this right of self-defence is a purely belligerent right and cannot be exerted in time of peace is unfounded. It proceeds upon the manifestly erroneous assumption that the rights of a nation upon the seas cannot be attacked or endangered except in time of war. That the instances calling for the exercise of the right in time of war are more frequent, and that they are comparatively rare in time of peace, is true; but that they may, and do, arise in time of peace is equally true.

Tenth. If it were true that a nation could not exercise in time of peace any act of force to protect its rights, it would follow that a nation could not interfere with a vessel under a different flag which was hovering on her coast, outside of the three mile limit, with an openly avowed intention of evading the revenue laws of the nation; or interfere with a vessel hovering in like manner and at a like distance from the coast of a nation's colony with an openly avowed intention of engaging in illicit trade with such colony; or interfere with a foreign vessel hovering outside of the three mile limit on the coast of a penal colony with an avowed intention of running in at a favorable moment and rescuing convicts; nor, if this were true, could a nation prevent a foreign ship with an infectious disease on board from coming within a distance of four miles from a port, even though it was reasonably certain that the disease would thereby, and at that distance be communicated to its people. Such conclusions would be repugnant to reason, as well as to the actual practice of nations.

Eleventh. The municipal laws or rules adopted by nations to govern the exercise of the right of self-defence are not always rigidly limited to a regulation of that right; but sometimes go further and seek to exercise a limited *legislative power* beyond the territorial limits of the nation. So far as they have the latter purpose in view they are exceptional, and can be defended only upon grounds of special necessity.

Rules and regulations providing for the seizure and condemnation of a vessel actually engaged in running a blockade would be a

mere regulation of the strict right of self-defence and be open to no objection; but if they went further and provided for the trial and punishment of the officers and crew, or for the seizure and condemnation of vessels for *past* breaches of a blockade, they would transcend the necessities of self-defence and assume the character of *legislation*. The arrest, trial, and conviction of persons for acts done by them on the high seas assume the right of legislating for the high seas; and the same thing may be said of a law which subjects a vessel to seizure and condemnation, not for a present invasion of the rights of a nation, but for one which has been completed and is past.

And so, also, it might be contended that a municipal law designed to prevent smuggling, or illicit trade, by prohibiting vessels from hovering within certain prescribed distances from the coast, transcended the requirements of necessary self-defence and partook of the character of legislation. The actual practice of nations has been not to draw a rigid line between the two descriptions of power, but to sanction reasonable restrictions and prohibitions imposed by a nation, although partaking of the character of legislation, when they were fairly designed to secure the purposes only of a just self-defence. (*Church vs Hubbard*, 2 Cranch, 287.)

Twelfth. But it is not necessary for the Government of the United States to insist, nor does it insist, upon a right to punish individual citizens of other nations who have been engaged in pelagic sealing as having been guilty of a crime, nor upon a right to seize and condemn vessels for having *in the past* been guilty of pelagic sealing, nor upon a right to establish any area of exclusion around any part of its territory. It insists only that if it be determined that it has a property in the Alaskan seal herd, or a property interest in the industry which it maintains upon the Pribilof Islands, that it follows, as a necessary consequence, that it has the right to prevent the invasion and destruction of those property interests, or either of them, by pelagic sealing, by the employment of such force as is reasonably necessary to that end.

Thirteenth. The Government of the United States conceives that, if its contention that it has the property interest above mentioned, one or both, be established, and a vessel fitted out for the purpose of pelagic sealing, under whatever flag, should approach the neighborhood of the Pribilof Islands and engage in the taking of seals at sea, it would have the right to prevent such taking of seals in the only manner in which it would be possible to prevent it, namely by the capture of the vessel; and that it can make no difference whether such vessel be three, or four, or more, miles from such islands; and that if such capture can be made anywhere within four miles of said islands, it may lawfully be made at any

distance from the islands where such right may be invaded, in the same manner.

Fourteenth. The United States insist that it would have the right last above mentioned without passing any municipal law, or adopting any municipal regulation, to secure it, or to govern its exercise; but it, at the same time, supposes that the passage of a law regulating the exercise of such right and providing for a mode of condemnation of vessels seized, would be entirely proper, and one of its reasonable duties. That it would serve the same just purposes as are answered by prize laws, namely, to give the citizens of other nations notice and warning of its intentions, regulate the conduct of seizing officers, prevent injustice and oppression, and inform the government, and other governments, respecting the regularity of any seizure, to the end that, if rightful, it should be adopted by the United States, and acquiesced in by other governments which might be interested; and, if otherwise, be repudiated and made the subject for just reparation.

Fifteenth. In respect to the seizures actually made and decrees of condemnation thereon, the United States perceives no particular in which they are irregular, unjust, or not defensible as an exercise of the right of necessary self defence. It does not defend any sentence of fine and imprisonment imposed upon any citizens of other nations for engaging in pelagic scaling; but insists that any invalidity with which such sentences may be affected, has no tendency to impair the validity of a condemnation otherwise valid.

Sixteenth. The familiar law of piracy illustrates and confirms the foregoing conclusions. The general consent of nations has sanctioned the practice of the arrest, trial, and sentence of pirates, even when they have not invaded any right of the nation so dealing with them, or its citizens, either of person or property. Pirates are every where justiciable. This is an exceptional instance in which nations are permitted to defend the general order, security, and peace of the seas. But it cannot be doubted that, irrespective of such general consent, and had it never been given, any nation would have the right to defend one of its own ships from capture by pirates, and, in the course of such defence, and as a part of it, to capture the piratical vessel and condemn it by proceedings in its own courts.

Seventeenth. The Government of the United States, therefore, bases its claim to defend its property interest in the seal herd and in its industry maintained upon the Pribilof Islands by such force exerted upon the high seas as may be reasonably necessary to that end upon the followings grounds :

1. The reason and necessity of the thing, there being no other means adequate to the defense of such rights.

2. The practice and usage of nations which always employs this means of defence.

Those, then, are the grounds upon which the United States asserts its right to the employment of reasonable force. If it has a property in the seals, that property is invaded whenever they are attacked by pelagic sealers, and that property interest in the seals themselves, and the necessity of defending it gives the United States the right to prevent that practice by the arrest and seizure of the guilty vessel. If it should be decided that it has not a property interest in the seals themselves, but has a property interest in the industry which it maintains upon the Pribilof Islands — a rightful, lawful and useful industry — then its right to arrest the practice of pelagic sealing upon the sea does not depend upon a property interest in the seals but upon the fact that that practice is an essential *wrong*, and is, besides, an invasion of the rightful industry which the United States carries on upon the land. To justify that act of pelagic sealing, it is necessary to show that it is in itself a right, and if that were shown, then the United States would have no right to interfere with it; but if it is in itself a *wrong* — if, upon the fundamental and immutable distinctions between right and wrong everywhere prevalent, upon the sea as well as upon the land, that act of destroying a useful race of animals is not defensible as a *right*, then, interfering as it does with the lawful rights and industry of the United States, they have the right to prevent it, and to prevent it by the employment of force.

We have two grounds, therefore, upon which we assert the existence of this right to the employment of force: The first is, the reason and necessity of the thing; because the declaration that we have a right involves the concession that there is some means of defending it. To say that a nation has a right which at the same time the citizens of every other nation may trample upon and violate with impunity, is to commit a solecism. Such a thing as that would have none of the characteristics of a right.

We defend it, in the next place, upon the practice and usage of nations. Wherever a nation is shown to have a right upon the high seas which is endangered by the wrongful acts of the citizens of other nations, there, according to the usage and practice of nations, at all times, in peace or in war, that right has been defended by the employment of reasonable force.

Now, Mr. President, I have concluded my argument upon the question of the right to employ force upon the high seas. I must now contemplate the possibility that this Tribunal may decide either that the United States have no property in the seals, and no property interest in the industry carried on upon the Islands of

which pelagic sealing is a wrongful invasion; or that, if they have those rights, or either of them, they still have no power to protect them by the seizure and condemnation of a vessel engaged in the practice of pelagic sealing. In either of those cases, the United States would have no power to protect the seals from extermination, and consequently, the subject would be left, to borrow the language of the Treaty, *in such a condition* as to require this Tribunal to proceed to the consideration of the last matter which is submitted to it, namely, what regulations it is necessary to establish for the purpose of preserving the seals.

Sir Charles Russell. I beg my friend's pardon for a moment. Mr. President, I wish to re-state the position which at an early part of these proceedings, we took upon the question of the order of proceeding. We maintained, and maintain, that the questions of right raised in various forms, the first five questions of article VI, are distinct from, and are to be dealt with in argument, distinct from the question raised in article VII, which is the matter of regulations. I understand, however, from my learned friend that it would be a convenient thing for him to be allowed to continue his discussion and end his address to the Tribunal, and to cover in that address his views upon the question of regulations. I do not, therefore, ask any opinion from the Tribunal as to whether that course ought or ought not to be permitted. I interpose no obstacle; but I wish to intimate to the Tribunal that we do not recede from the position we took here, and we shall respectfully claim the right to present complete, by my learned friends and myself, our argument upon the question of right, and not mix up with that question of right the entirely separate and distinct question embracing different considerations which touch the matter of regulations. With that respectful representation of our views to the Tribunal, I do not further interpose.

The President. We thank you, Sir Charles, for the views which you take of the manner of proceeding. The Tribunal have agreed that they would allow the counsel of either party to proceed in their argument, according to their own convenience. We have merely asked the counsel in the proceeding here as much as they would deem it possible, to treat separately in two distinct parts of their argument the legal questions which are enumerated in article VI of the Treaty, and the question of regulations which is alluded to in article VII. This, I notice, Mr. Carter is prepared to do. He has been dealing until now with the legal questions, and I think he is coming now to the points which are referred to in article VII. Consequently that is quite according to what we ask you to do, and we are much obliged to you that you do it. The counsel for Great Britain asks for no opinion on

the part of the Tribunal and consequently the counsel for Great Britain will be free to treat the matter according to their own convenience, either separately in two distinct arguments, or else in the same way as Mr. Carter has dealt with it. I conceive that with the agreement of all parties Mr. Carter is free to continue his argument as he intended.

Mr. Justice Harlan. If the President means to say for the Tribunal that there is a recognized right of counsel to make two arguments, first, on the five questions named in article 6, and after that, at some future time, to claim a right to enter into a distinct argument as to regulations, I do not concur in that view. And I do not understand that the Tribunal have so decided. I do not think we need to retire to consider that. I make these observations so that it will not hereafter be said that the right is reserved to cut this argument in two and to have this Tribunal make an intimation as to our conclusions upon the first five points in article VI and thereby inform the public of our conclusions upon those points before we take up the subject of regulations. I do not wish to be understood as concurring in that view.

Lord Hannen. That is a different question. We have not expressed any opinion, or attempted to come to a conclusion upon that point otherwise than is indicated by Mr. Justice Harlan. I regret that there is a difference between us as to what was agreed upon; but perhaps we can consider that at our adjournment.

Mr. Justice Harlan. I do not understand that there in any difference between us as to what we have decided. We did agree that counsel should proceed in their argument as they should deem proper covering these questions.

But I understood the President a moment or two ago to say that the Tribunal had decided, or were to be understood as having decided, that the counsel for the British Government could proceed with his argument on the main questions according to his own pleasure, and, at some future time, after an intimation of our opinion upon the first five points, make an argument upon the subject of regulations. I understood counsel at an early stage of our proceedings to say that he would claim those rights. I only intervene now to say that I have not understood that the Tribunal have decided any such thing, or that we have considered that matter.

The President. I believe that the counsel for Great Britain do not now ask us to deliver any sort of opinion after they have treated the legal points. I merely understood that they ask to be allowed that several of them might speak and argue upon the legal points and, after that, resume the argument about the regulations. That is a mere matter of division of work between themselves. One of them will begin speaking about legal points; another will

continue about legal points and then afterwards resume the argument with reference to the regulations.

Sir Charles Russell. If I may with propriety interpose, there is no reason why I should not explicitly state what we mean. What we mean is this : That my learned friends and myself propose to submit a complete argument, dealing with one subject, and one subject only, distinct and separate in its character and to which legal considerations alone apply; that having presented that argument, unmixed and unconfused with any other on a different subject, we shall then, at what ever moment is convenient to the Tribunal, proceed, may be immediately, to discuss the question of regulations; but that we shall present two arguments separately.

Lord Hannen. You will not call upon us to give a decision upon the five points before your argument upon the question of regulations?

Sir Charles Russell. No, my Lord, I have not suggested that at all.

Lord Hannen. That is the only question upon which it is supposed there is a difference between us, and that will, of course, disappear in view of your explanation.

Sir Charles Russell. I ought to state, perhaps, that I mentioned this to my learned friend, Mr. Phelps, as a course which might obviate the necessity of the Tribunal being called upon to make any decision upon a legal point as to which there might, or might not, be differences of opinion amongst the Tribunal; and I think my learned friend will say that he recognised my suggestion as a reasonable one.

Mr. Phelps. Yes; the course suggested by Sir Charles Russell will be quite acceptable to us. The only point of difference at the outset was that suggested whether the Tribunal was called upon to express a decision, or an opinion, upon the previous points before hearing the argument in respect to the regulations; but as counsel on both sides understand it now, that claim will not be made; and we do not object at all to the course of the argument proposed by my learned friend on the other side.

Justice Harlan. Of course what I state shows that I made no criticism of that arrangement at all. I only understood the observation of the President to go beyond that. That is why I made any remark.

The President. I merely say that counsel for Great Britain will be free to argue their case as they like, and divide their work between themselves as they like. The Tribunal has agreed in leaving all liberty to counsel for either party to argue their case as they like, and the Tribunal not to make any decision until the

whole argument of the case has been gone through by both parties.

I think we have now come to an agreement and we are ready to have Mr. Carter proceed.

Mr. Carter. The subject, Mr. President, which is now to engage my attention is that which, in a certain contingency contemplated by the treaty, has reference to the framing of regulations, to be concurred in by Great Britain, for the preservation of the seals. I think I have already observed at sometime in the course of my argument that, however the two nations may have differed upon what may be called questions of right, and however wide their differences may have been upon those questions, there is one point upon which they were agreed at the outset, and upon which they have been at all times since apparently agreed, and upon which I hope they will continue to be agreed until the argument of this controversy is disposed of; that is, the necessity upon all grounds and in the interest of all nations that this useful race of animals shall not be exterminated, but shall be preserved, and its benefits and blessings be made available perpetually for the use of mankind. It will be seen that the treaty itself possesses two principal aspects. One of them calls upon this Tribunal to determine certain questions affecting assertions of right upon the part of the United States, which questions, were they decided in favor of the United States, would, or might, presumably, confer upon that nation the right to exercise this power of protection, and render any further consideration of the question of protection needless. The next feature of the treaty is that, if those questions should be determined adversely to the United States, so that it would not have the power itself to take measures for the preservation of the seals, then the Tribunal should consider what measures these two nations should take conjointly with each other to that end.

There is, or may be a question as to the interpretation of article VII of the Treaty, which I will now read :

If the determination of the foregoing questions as to the exclusive jurisdiction of the United States shall leave the subject in such position that the concurrence of Great Britain is necessary to the establishment of Regulations for the proper protection and preservation of the fur-seal in, or habitually resorting to, the Behring Sea, the Arbitrators shall then determine what concurrent Regulations outside the jurisdictional limits of the respective Governments are necessary, and over what waters such Regulations should extend, and to aid them in that determination the report of a Joint Commission to be appointed by the respective Governments shall be laid before them, with such other evidence as either Government may submit.

The High Contracting Parties furthermore agree to coöperate in securing the adhesion of other Powers to such Regulations.

The language which is used in the beginning of this article is

“ If the determination of the foregoing questions as to the exclusive jurisdiction of the United States ”. There are five foregoing questions and all the five seem to be embraced by that language. And yet when we look to the last of those five questions, we find it to be, “ Has the United States any right, and if so, what right, of protection or property in the fur-seals frequenting the islands of the United States in Behring Sea when such seals are found outside the ordinary three-mile limit? ” That does not appear, on its face, to be question relating to the exclusive jurisdiction of the United States, and therefore it would not, on its face, appear to be properly described by the language with which the seventh article begins.

My own impression is that that fifth question is regarded by this seventh article of the treaty, as a question relating to the exclusive jurisdiction of the United States, using that word “ jurisdiction ” in the sense in which it is so often used, in the sense of power. In other words, the Treaty regards the question, whether the United States has any exclusive property interest in the seal herd, and an exclusive right to protect them upon the high seas, as a question of jurisdiction on the high seas, implying the view that if the United States has the exclusive property in them, or a property in this industry which justifies them in exercising a right of protection, that it has the exclusive right of protection upon the high seas, and that that is properly enough styled a question of “ jurisdiction ”. I myself incline to that interpretation, but as I have already said in a former part of my argument, it is not necessary to go into any nice interpretation of the language in that particular; for whichever interpretation we adopt, the same result is practically reached.

I say it is of no practical consequence which view is adopted. The same result will follow, whatever answer is given to this question of interpretation; for *all* the five questions are to be determined *before* the Tribunal is called upon to consider the question of regulations; and the disposition to be made of that question depends upon the condition in which the subject is left after the decision of the five questions. For instance, if we proceed upon the view that the language referred to relates to the first four questions only, and those are decided against the United States, it will be necessary for the Tribunal to consider what regulations are necessary; but, should the decision of the fifth question be at the same time in favor of the United States, the conclusion upon such consideration might be that no regulations were *in fact* necessary. Such would perhaps be the conclusion if the Tribunal should be of the opinion that the possession of a property interest would give the United States the power to protect it by the employment of force

upon the high seas; but if the Tribunal should hold, contrary to my argument, that the possession of that interest would not give the right to employ force to prevent pelagic sealing, then concurrent regulations would become necessary.

On the other hand, if the language referred to be taken to include *all* of the five questions, the fifth question being regarded as one relating to jurisdiction in the sense in which that word is employed, the subject will be left in such a condition that the concurrence of Great Britain in regulations will be necessary, provided the Tribunal should be of opinion either that the United States had no property interest, or that such interest gave no right to employ force in its protection.

Therefore I shall not engage in any further discussion of this question of interpretation. It is practically of no consequence.

What shall be the regulations for the preservation of the seals? I must now assume the subject to be left in such a condition that it is necessary that regulations of this character should be contrived? What are their requirements? There are two qualifications mentioned in the Treaty, and *two only*. In the first place, they must be regulations operative *outside* of the jurisdictional limits of the two Governments. In other words, the field of their operation is to be on the high seas alone.

That is one condition. The only other description that we have of them is, that they shall be such as are *necessary for the preservation* of the seals. Fitness for the accomplishment of that end is the only requirement, and that is an absolute requirement of these regulations. But right there I am met by some intimations, in the Case and in the Argument on the part of Great Britain, that a somewhat different interpretation may be set up, and that some limitations will be sought to be imposed upon the regulations which may be recommended by this Tribunal. In the first place, that they must be regulations conditioned upon the *consent* of other nations than Great Britain and the United States, and not operative until the consent of the other powers shall be obtained. I am not exactly certain, but I gather from what is contained in the Case and Argument on the part of Great Britain, that that ground may be taken. It cannot be maintained.

In the first place, it is not expressed in the Treaty. No such limitation is expressed there; and the omission to express it is in itself significant, because the subject of the consent of other powers is mentioned, and there is an engagement at the close of the article, as follows: "The High Contracting Parties furthermore agree to cooperate in securing the adhesion of other powers to such regulations". That language of itself excludes any implication that the operation of the regulations is to be conditioned upon the assent of

other powers. It assumes that they are to be in operation; and that it will be a matter of utility, of convenience, that the assent of other powers shall be gained to them; and the parties engage to take all measures within their power to gain that assent.

I say therefore, that not only is it not expressed in the treaty, that the regulations shall be thus conditional, but that we cannot imply it; and that the contrary is indeed suggested, if not absolutely required, by the terms of the article itself.

Senator Morgan. Mr. Carter, if the award of this Tribunal is to be merely tentative and not binding upon the parties that have submitted this case to the decision of these Arbitrators, why are we sitting here? We are not diplomatists; we are not advising counsel or the particular friends of either Government.

Mr. Carter. That is one view, and a very proper and important one, having the same tendency as the view that I am now submitting to the Tribunal.

Senator Morgan. I do not hesitate to say on my part that if this award is to be accepted by the respective governments, or rejected, at their pleasure, and is not to be an award in full force from the time it is recorded and delivered here, I will withdraw from this Tribunal.

Mr. Carter. I do not understand that there is any suggestion from any quarter that the award of this Tribunal is to be accepted or rejected at the pleasure of the parties; but it may be argued that this Tribunal may make the regulations which it suggests conditional for their operation upon the assent of other powers. It is that supposed position I am speaking to. I am sure the ground is not taken that the award of this Tribunal may be accepted or rejected at the pleasure of the parties. The contrary I have reason to know is conceded upon both sides and maintained on both sides.

The President. Of course, Mr. Carter, when you speak of other powers, you mean other powers than Great Britain and the United States?

Mr. Carter. Yes. There is further evidence derived from the correspondence which preceded the Treaty that it is subject to no such interpretation as that. After the Treaty had been reduced substantially to the form in which it now stands, but before it was signed by the parties, although its phraseology was understood to be complete, a suggestion came from Lord Salisbury that the award of the Tribunal upon the subject of regulations should be made conditional upon the consent of other powers. That suggestion will be found at page 339 of volume I of the Appendix to the Case of the United States in the note from Sir Julian Pauncefote to Mr. Blaine. He says:

BRITISH LEGATION,

Washington, November 23, 1891.

SIR : I informed the Marquis of Salisbury of our proposal to sign the text of the seven articles to be inserted in the Behring Sea Arbitration agreement and of the Joint Commission article, as settled in the diplomatic correspondence, in order to record the progress made up to the present time in the negotiation.

Lord Salisbury entirely approves of that proposal, but he has instructed me, before signing, to address a note to you for the purpose of obviating any doubts which might hereafter arise as to the meaning and effect of article 6, which is as follows :

The Arbitrators will remember that the present article 7 stood originally as article 6.

If the determination of the foregoing questions as to the exclusive jurisdiction of the United States shall leave the subject in such position that the concurrence of Great Britain is necessary to the establishment of regulations for the proper protection and the preservation of the fur-seal in or habitually resorting to the Behring Sea, the Arbitrators shall then determine what concurrent regulations outside the jurisdictional limits of the respective governments are necessary, and over what waters such regulations should extend; and, to aid them in that determination, the report of the joint commission to be appointed by the respective governments shall be laid before them, with such other evidence as either Government may submit. The contracting powers furthermore agree to cooperate in securing the adhesion of other powers to such regulations.

Lord Salisbury desires to make the following two reservations on the above article :

His lordship understands, first, that the necessity of any regulations is left to the Arbitrators, as well as the nature of those regulations, if the necessity is in their judgment proved; secondly, that the regulations will not become obligatory on Great Britain and the United States until they have been accepted by the other maritime powers. Otherwise, as his lordship observes, the two Governments would be simply handing over to others the right of exterminating the seals.

I have no doubt that you will have no difficulty in concurring in the above reservations, and subject thereto I shall be prepared to sign the articles as proposed.

I have, etc.,

JULIAN PAUNCEFOTE.

A copy of that note was furnished to Mr. Blaine, and his answer is found on the following page. 340 :

DEPARTMENT OF STATE,

Washington, November 27, 1891.

SIR : In the early part of last week you furnished the exact points which had been agreed upon for arbitration in the matter of the Behring Sea negotiation. You called later and corrected the language which introduced the

agreement. In fact, the two copies framed were taken entirely from your minutes. It was done with a view that you and I should sign them, and thus authenticate the points for the Arbitrators to consider.

You inform me now that Lord Salisbury asks to make two reservations in the sixth article. His first reservation is that "the necessity of any regulation is left to the Arbitrators, as well as the nature of those regulations if the necessity is in their judgment proved."

What reason has Lord Salisbury for altering the text of the article to which he had agreed? It is to be presumed that if regulations are needed they will be made. If they are not needed the arbitrators will not make them. The agreement leaves the arbitrators free upon that point. The first reservation, therefore, has no special meaning.

The second reservation which Lord Salisbury makes is that "the regulations shall not become obligatory on Great Britain and the United States until they have been accepted by the other maritime powers." Does Lord Salisbury mean that the United States and Great Britain shall refrain from taking seals until every maritime power joins in the regulations? Or does he mean that sealing shall be resumed the 1st of May next and that we shall proceed as before the Arbitration until the regulations, have been accepted by the other "maritime powers?"

"Maritime powers" may mean one thing or another. Lord Salisbury did not say the *principal* maritime powers. France, Spain, Portugal, Italy, Austria, Turkey, Russia, Germany, Sweden, Holland, Belgium, are all maritime powers in the sense that they maintain a navy, great or small. In like manner, Brazil, the Argentine Confederation, Chile, Peru, Mexico, and Japan are maritime powers. It would require a long time, three years at least, to get the assent of all these powers. Mr. Bayard, of the 19th of August, 1887, addressed Great Britain, Germany, France, Russia, Sweden and Norway, and Japan with a view to securing some regulations in regard to the seal in Behring Sea. France, Japan, and Russia replied with languid indifference. Great Britain never replied in writing. Germany did not reply at all. Sweden and Norway said the matter was of no interest to them. Thus it will be again. Such a proposition will postpone the matter indefinitely.

The President regards Lord Salisbury's second reservation, therefore, as a material change in the terms of the arbitration agreed upon by this Government; and he instructs me to say that he does not feel willing to take it into consideration. He adheres to every point of agreement which has been made between the two powers, according to the text which you furnished. He will regret if Lord Salisbury shall insist on a substantially new agreement. He sees no objection to submitting the agreement to the principal maritime powers for their assent, but he can not agree that Great Britain and the United States shall make their adjustment dependent on the action of third parties who have no direct interest in the seal fisheries, or that the settlement shall be postponed until those third parties see fit to act.

I have, etc.,

JAMES G. BLAINE.

Lord Salisbury was not quite satisfied with that answer; and another letter, or others letters, were written in reference to it, and responses more or less to the same effect were made on the part of Mr. Blaine, namely, that the President could not assent to any such alteration of the treaty; and in view of that unwillingness on the part of the United States, Lord Salisbury withdrew his request and

adopted the text of the treaty as it stood, and, I think I may say, adopted the views of Mr. Blaine in reference to it. That acceptance of the treaty as it stood will be found on page 345 in the note of Sir Julian to Mr. Blaine :

BRITISH LEGATION,

Washington, December 17, 1891.

SIR : I have the honor to inform you that I conveyed to the Marquis of Salisbury by telegram the substance of your note of the 14th instant respecting the sixth article of the proposed Behring Sea Arbitration agreement, and that I have received a reply from his lordship in the following sense :

Lord Salisbury is afraid that, owing to the difficulties incident to telegraphic communications, he has been imperfectly understood by the President. He consented, at the President's request, to defer for the present all further discussion as to what course the two Governments should follow in the event of the regulations prescribed by the Arbitrators being evaded by a change of flag. It was necessary that in doing so he should guard himself against the supposition that by such consent he had narrowed the rights of the contending parties or of the Arbitrators under the agreement.

But in the communication which was embodied in my note of the 11th instant, his lordship made no reservation, as the President seems to think, nor was any such word used. A reservation would not be valid unless assented to by the other side, and no such assent was asked for. Lord Salisbury entirely agrees with the President in his objection to any point being submitted to the Arbitrators which is not embraced in the agreement; and, in conclusion, his lordship authorizes me to sign the articles of the Arbitration agreement, as proposed, at the close of your note under reply, whenever you may be willing to do so.

I have, etc.,

JULIAN PAUNCEFOTE.

Of course that puts that question at rest.

Sir Charles Russell. The view of the Government of Great Britain, and the point which we intend to support is in the letter of the 11th of December, 1891.

Mr. Carter. Would you like to have that read?

Sir Charles Russell. Yes, if you kindly would. It is in the second paragraph on page 344.

Mr. Carter. The letter is short. It is from Sir Julian to Mr. Blaine :

BRITISH LEGATION,

Washington, December, 11, 1891.

SIR : I have the honor to inform you that I telegraphed to the Marquis of Salisbury the substance of your note of yesterday respecting the sixth article of the proposed Behring Sea Arbitration agreement, and that I have received a reply from his lordship to the following effect: In view of the strong opinion of the President, reiterated in your note of yesterday, that the danger apprehended by Lord Salisbury, and explained in my note of the 8th instant, is too remote to justify the delay which might be incurred by guarding against it now, his lordship will yield to the President's appeal and not press for further discussion at this stage.

Her Majesty's Government of course retain the right of raising the point when the question of framing the regulations comes before the Arbitrators, and it is understood that the latter will have full discretion in the matter, and may attach such conditions to the regulations as they may *a priori* judge to be necessary and just to the two powers, in view of the difficulty pointed out.

With the above observations Lord Salisbury has authorized me to sign the text of the seven articles and of the Joint Commission article referred to in my note of the 23d ultimo, and it will give me much pleasure to wait upon you at the State Department for that purpose at any time you may appoint.

I have, etc.,

JULIAN PAUNCEFOTE.

Mr. Justice Harlan. Will you read the letter which is below that, which is in reply to the note of the 11th.

Mr. Carter. Yes. This is the letter of Mr. Blaine to Sir Julian.

DEPARTEMENT OF STATE,

Washington, December 14, 1891.

SIR : I have the honor to advise you that I submitted your note of the 11th instant to the President. After mature deliberation he has instructed me to say that he objects to Lord Salisbury's making any reservation, at all, and that he can not yield to him the right to appeal to the Arbitrators to decide any point not embraced in the articles of Arbitration. The President does not admit that Lord Salisbury can reserve the right in any way to affect the decision of the Arbitrators. We understand that the Arbitration is to proceed on the seven points which are contained in the articles which you and I certify were the very points agreed upon by the two Governments.

For Lord Salisbury to claim the right to submit this new point to the Arbitrators is to entirely change the Arbitration. The President might in like manner submit several questions to the Arbitrators, and thus enlarge the subject to such an extent that it would not be the same arbitration to which we have agreed. The President claims the right to have the seven points arbitrated and respectfully insists that Lord Salisbury shall not change their meaning in any particular. The matters to be arbitrated must be distinctly understood before the Arbitrators are chosen. And after an arbitration is agreed to neither of the parties can enlarge or contract its scope.

I am prepared now, as I have been heretofore, to sign the articles of agreement without any reservation whatever, and for that purpose I shall be glad to have you call at the State Department on Wednesday the 16th instant, at 11 o'clock a m.

I have, etc.,

JAMES G. BLAINE.

The President. Mr. Carter, how would you construe the seven points that was referred to in this letter?

Mr. Carter. Do you mean this phrase, "The President claims the right to have the seven points arbitrated", etc.

The President. Yes. I suppose it means the five regulations and the joint commission article.

Mr. Carter. Yes.

The President. You have no particular construction of that? There were six articles in the original treaty.

Mr. Phelps. The seventh is the question of damages.

Mr. Carter. Yes; the seventh is the question of damages. The letters I have read seem to put this matter at rest; for the letter of Sir Julian of December 17th acquiesces in the view of Mr. Blaine, in his letter of the 14th, which I have just read. It was evidently regarded by both sides that this seventh article of the treaty, upon its face, upon a just interpretation of the language embraced by it, did not contemplate that the regulations should be conditioned upon the acquiescence of other powers.

It was upon that assumption that Lord Salisbury wished to have an understanding tacked on to it to the effect that they should be so conditioned. That was refused. He then wished to reserve the right to argue before the Arbitrators that the regulations should be so conditioned. Even that is objected to; and the treaty is eventually signed upon the assumption, agreed to by both sides, that it must be executed according to its language, without any addition or any reservation or any right other than what appears upon the face of it. If it were a question whether it was expedient that the regulations should be conditioned upon the assent of other powers, it should be promptly decided in the negative. Such a condition would be fatal to the main object. Every one must see the possibility—the probability even—that some power might be induced to withhold its assent; and even if no country should finally withhold its assent, how long would it take before the assent of all was obtained? We know the delays incident to diplomatic negotiations; and there would be no good reason to suppose that this universal assent could be obtained in less than three or five years; and in that time the seals would be gone. Therefore, any regulations upon the subject of preserving the seals which will have any efficiency to that end must be regulations immediately operative so far as the two Governments are concerned.

And practically no difficulty will arise if that view is acted upon. If pelagic sealing is prohibited by Great Britain and the United States, no vessel under either of their flags can make its appearance upon the seas for that purpose; and I venture to say that no other nation in the world, after regulations of that character framed by a Tribunal such as this, would allow its flag to be used for any such purpose. The public sentiment of mankind, authoritatively declared, by a tribunal of this character, composed of representatives selected from different nations, would be everywhere respected. There is no good reason to suppose that there would be an attempt to violate it from any quarter; and if there

were any, it would be one which could be, upon very firm grounds resisted, and the violations would not be frequently repeated. So I conclude that there is no such limitation to be put upon the regulations which are to be recommended by the Arbitrators.

There is another point in which it is intimated in the Argument on the part of Great Britain that these regulations should be limited. That is that the treaty should be so interpreted as to mean that whatever regulations are recommended by the Tribunal shall be applicable to Behring Sea only, and not to the North Pacific Ocean. I do not know whether that will be persisted in. It may be. The ground suggested is that the whole subject of original controversy was the authority which the United States claimed it could exercise in Behring Sea; that it did not claim that it had the right to exercise jurisdiction any where else, and that, the whole subject of controversy being thus confined to Behring Sea, the scope of the regulations should be in like manner limited, and should not pass those boundaries. I have to say that construction cannot be maintained. There is no such view as that to be gathered from the face of the treaty itself; indeed, upon the face of the treaty itself, that view is rather to be rejected.

The language seems to be rather industriously framed to exclude such a view as that. The regulations which are described are not to be regulations operative *in* Behring Sea, but the Arbitrators are to determine what concurrent [regulations *outside* the jurisdictional limits of the respective Governments are necessary, and *over what waters* such regulations should extend. The whole question of the extent of the waters over which they were to go is left to the Arbitrators without any limitation whatever.

This interpretation, therefore, if it is to be accepted at all, must be accepted upon the ground that there is some implication which required it. But are we to imply a limitation of that sort? Such a limitation would be inconsistent with the avowed purpose of both parties from the beginning of this controversy. This plan of regulating pelagic sealing through the instrumentality of an Arbitration was originally the suggestion of Great Britain; and it was, at the beginning, coupled with a statement of the importance of the preservation of this race of seals—the importance, not only to Great Britain, or to the United States, but to mankind. That was the ground upon which it was originally placed by Sir Julian Pauncefote; and at every stage of this controversy, it has been the avowal of those who represented Great Britain that it was her supreme desire that this race of seals should be preserved and its extermination prevented. It would be, as it seems to me, an imputation upon the sincerity of Great Britain to say that her real intention was to extend this protection only in Behring Sea, and that if

the fact should appear that the race would be exterminated unless protection were extended to them in the North Pacific Ocean as well, Great Britain would, under those circumstances, be willing to see that the seals should be exterminated. Can it be imputed to Great Britain that she intended to preserve this race of seals only in case it could be preserved by regulations operative upon Behring Sea? What difference does it make *where* the regulations should be operative? If the important point be that the seals should be preserved for the benefit of mankind, then they should be preserved by regulations extending over any seas where Great Britain and the United States can make them operative; and of course they can give them operation all over the world so far as they themselves are concerned.

The President. Outside the territorial waters.

Mr. Carter. Yes. Of course not in the territorial waters, not in the three-mile limit. That is a limitation; but outside of those territorial waters. If it turns out, in point of fact, that regulations operative upon the North Pacific are necessary, I say, it would be imputing to Great Britain a piece of insincerity to say that she did not intend, or did not desire, to have the race of fur-seals preserved in such a case as that. If she is sincere in her intention to preserve the race of seals, she must desire that they shall be preserved by regulations which will be efficient to that end, whether they are operative in Behring Sea alone, or whether they are operative in the North Pacific as well.

But that there was any such notion as that entertained by the parties to the treaty is entirely inconsistent with their views as expressed in the diplomatic correspondence. I refer to the draft convention submitted by Sir Julian Pauncefote, which will be found in Volume I, United States Appendix, page 311. The fifth article of that is as follows :

A commission of four experts (that is, a commission of experts should be appointed).

Two nominated by each Government, and a chairman nominated by the arbitrators, if appointed, and, if not, by the aforesaid commission, shall examine and report on the following question :

What international arrangements, if any, between Great Britain and the United States and Russia or any other power, are necessary for the purpose of preserving the fur-seal race in the northern Pacific Ocean from extermination?

That is the first suggestion of a commission of experts — of a Tribunal, to contrive measures for the preservation of the fur-seals. It comes from Great Britain, and the suggestion is not of measures confined to Behring Sea at all, but of measures operative upon the North Pacific Ocean as well, and designed to protect not only the seals belonging to the Pribilof Islands, but the seals of Russia

also. It is a suggestion of a scheme for the protection of the fur-seal all over the North Pacific Ocean.

And Sir Julian Pauncefote also, at a later period, in a letter written on the 11th of June, 1891, when the negotiations in relation to the Treaty were in progress, and had nearly been brought to a conclusion, says—I read from the third paragraph on page 315:

Nevertheless, in view of the urgency of the case, his Lordship —

(His Lordship, of course, is Lord Salisbury.)

is disposed to authorize me to sign the agreement in the precise terms formulated in your note of June 9, provided the question of a joint commission be not left in doubt and that your Government will give an assurance in some form that the will concur in a reference to a joint commission to ascertain what permanent measures are necessary for the preservation of the fur-seal species in the Northern Pacific Ocean.

There again the Government of Great Britain is pressing the Government of the United States to assent to its idea of the constitution of a commission for the purpose of making inquiries as to what protective regulations shall be necessary to preserve the race of seals in the North Pacific Ocean, no matter where they belong.

Mr. Wharton's answer to this was written the same day:

DEPARTMENT OF STATE,
Washington, June 11, 1891.

SIR: I have the honor to acknowledge the receipt of your note of today's date, and in reply I am directed by the President to say that the Government of the United States, recognizing the fact that full and adequate measures for the protection of seal life should embrace the whole of Behring Sea and portions of the North Pacific Ocean, will have no hesitancy in agreeing, in connection with Her Majesty's Government, to the appointment of a joint commission to ascertain what permanent measures are necessary for the preservation of the seal species in the waters referred to, such an agreement to be signed simultaneously with the convention for arbitration, and to be without prejudice to the questions to be submitted to the arbitrators.

There is the first direct and explicit assent of the United States given to the project of the constitution of a joint commission for the purpose of ascertaining what regulations are necessary; and that assent contains the express statement that the measures were supposed to be necessary operative not only in Behring Sea, but in the North Pacific.

On the 15th of January, 1893, which was after the articles of the Treaty had been drawn up and signed — I am now reading from the Report of the British Commissioners, page 7. It was signed by the parties in December.

The President. I think not. "Ratification advised by Senate March 29th : ratified by the President April 22nd : and ratifications exchanged May 7th. "

Mr. Justice Harlan. Mr. Carter means that the formal articles which went into the Treaty, and the articles about the Commission were signed the 18th of December.

Mr. Carter. The two agreements signed by the diplomatic representatives of the party, namely, the agreement for the arbitration, and the agreement for the appointment of the joint Commission, were signed December 18th, and you will remember that the Commissioners were actually appointed before the Treaty was finally ratified. Lord Salisbury on the 15th of January, 1892, addresses a letter of instructions to the British Commissioners. I read from about the middle of that letter. It is the second enclosure referred to in the preliminary part of the report :

You will observe that it is intended that the Report of the Joint Commissioners shall embrace recommendations as to all measures that should be adopted for the preservation of seal life. For this purpose, it will be necessary to consider what Regulations may seem advisable, whether within the jurisdictional limits of the United States and Canada, or outside those limits. The Regulations which the Commissioners may recommend for adoption within the respective jurisdictions of the two countries will, of course, be matter for the consideration of the respective Governments, while the Regulations affecting waters outside the territorial limits will have to be considered under clause 6 of the Arbitration Agreement in the event of a decision being given by the Arbitrators against the claim of exclusive jurisdiction put forward on behalf of the United States.

The Report is to be presented in the first instance to the two Governments for their consideration, and is subsequently to be laid by those Governments before the Arbitrators to assist them in determining the more restricted question as to what, if any, Regulations are essential for the protection of the fur-bearing seals outside the territorial jurisdiction of the two countries.

Senator Morgan. Mr. Carter, have you that clause 6 before you?

Mr. Carter. Of the Treaty?

Senator Morgan. No; it does not say the Treaty, as I understand. It is one of those agreements. I wanted to know whether clause 6 mentioned in that letter was identical with clause 7 of the Treaty?

Mr. Carter. Oh yes; it was substantially identical with the clause mentioned in the Treaty.

Senator Morgan. Is it known at whose instance that sixth clause was made article VII of the Treaty?

Mr. Carter. When they came to put the agreement for the arbitration and the agreement for the appointment of the joint com-

mission into one document, which is the Treaty, then it became necessary to make that change. The consolidation of the two instruments made that change necessary; as I suppose.

Mr. Foster. The first five questions are in article VI of the Treaty, and the regulations, following, became article VII.

The President. General Foster, perhaps you can tell us. There was a remodeling of the Treaty after this 18th of December, I suppose?

Mr. Foster. When the negotiators came to complete the Treaty, they consolidated these two agreements; and in numbering the articles, the first five questions became article VI of the Treaty, and the agreement concerning regulations, following, became article VII of the Treaty. It was simply an enumeration of the articles of the Treaty, and that had become Article VII.

The President. That was after December 18th?

Mr. Foster. Yes.

The President. But there was no substantial change in the text?

Mr. Foster. There was no change whatever in the language, simply a change in the numbering of the articles.

Mr. Carter. I have read from documents showing what the interpretation of Great Britain was in this particular. I now call attention to a document showing the interpretation of the United States, and that is in the appointment of the Commissioners under the Treaty, on page 314 of the Case of the United States. The Commissioners there refer to the letter of the Secretary of State appointing them :

SIR : In your letter of July 10, 1891, received by us in San Francisco on the 16th, after referring to the diplomatic controversy pending between United States and Great Britain in respect to the killing of fur-seals by British subjects and vessels, to the causes which led up to this controversy, and to some of the propositions which had at that date been mutually agreed upon, you inform us that the President has been pleased to appoint us to proceed to the Pribilof Islands and to make certain investigations of the facts relative to seal life with a view to ascertaining what permanent measures are necessary for the preservation of the fur-seal in Behring Sea and the North Pacific Ocean.

[The Tribunal here took a recess.]

[On reassembling, Mr. Carter resumed his argument.]

Mr. Carter. Another evidence, Mr. President, tending to show that in the contemplation of the Treaty the regulations were not to be limited to Behring Sea, is found in the change of form of the sixth question. As originally proposed it was in this language; I read from page 286 of the Appendix to the first volume of the United States Case :

Sixth. If the determination of the foregoing questions shall leave the subject in such position that the concurrence of Great Britain is necessary in prescribing regulations for the killing of the fur seal in any part of the waters of Behring Sea, then it shall be further determined, etc., etc.

You will observe there that the language of the regulation here proposed is : " killing of the fur-seals in any part of the waters of Behring Sea ", giving some ground for a suggestion that the Regulations were to be confined to Behring Sea; but, after the correspondence which I have referred to, and in which it was indicated upon both sides that there was a necessity that the Regulations should extend outside Behring Sea, or that there might be a necessity for an extension outside of that Sea, the form of this Article was changed; and on page 319 of the same volume will be found the statement of it in its changed form as adopted in the Note from Mr. Wharton to Sir Julian Pauncefote (quoting) :

(6) If the determination of the foregoing questions as to the exclusive jurisdiction of the United States shall leave the subject in such position that the concurrence of Great Britain is necessary to the establishment of regulations for the proper protection and the preservation of the fur seal in, or habitually resorting to, the Behring Sea, the arbitrators shall then determine, etc., etc.

The words, " or habitually resorting to," are now introduced indicating that the protection was to be extended to the seals resorting to Behring Sea, wherever it might be necessary that those Regulations should be operative; and that was the form in which it was adopted.

Now, in order to show that the Regulations ought not to be limited to Behring Sea, but that they should be extended to the North Pacific, I point to the Report of the British Commissioners. They think they should be operative on the Pacific Ocean and not confined to Behring Sea. The suggestion upon pelagic sealing which they themselves present in their Report and which is made part of the British Case is that it is necessary that the prohibitions shall apply not only to Behring Sea, but to the waters of the Pacific itself.

And, touching that necessity, I may further allude to a letter addressed by a Mr. C. Hawkins to the Marquis of Salisbury on the 19th of April, 1891 — volume 3, Appendix to the British Case, United States, No, 3 (1892), page 5. Mr. Hawkins says :

In consequence of the negotiations being carried on between the United State's Government and our own to bring about a satisfactory settlement of the Behring's Sea Seal Fishery question, I beg to offer you the following facts, trusting they may be useful to you as emanating from one with a practical knowledge extending over a period of eighteen years.

I also inclose herewith a cutting from the " Daily Chronicle " of the above date, which induces me to take this liberty, supposing the statement therein detailed to be correct.

Since about the year 1885 we have received in this country large numbers of sealskins known in the trade as north-west coast skins, the same having been taken in the open sea, and, from appearances that are unmistakable to the initiated, are exclusively the skins of female seals pregnant; these are all shot, and I have been informed that for every skin recovered five or six are lost through sinking when struck by the shot; this wholesale slaughter of the females will, in a short time, bring about the extermination of the seal in that district if not arrested.

That letter was referred by Lord Salisbury to the Canadian Government, and a Report was made to the Privy Council of that Government, which is found on page 75 of the same part of the British Appendix (reading) :

Report of a Committee of the Honourable the Privy Council, approved by his Excellency the Governor-General in Council on the 27th June, 1891.

The Committee of the Privy Council have had under consideration certain papers from the Colonial Office on the subject of the seal fishery in Behring's Sea.

The Minister of Marine and Fisheries, to whom the matter was referred, observes that Mr. Hawkins states " since about the year 1885 we have received in this country (England) large numbers of seal-skins, known in the trade as the north-west coast skins, the same having been taken in the open sea, and, from appearances that are unmistakable to the initiated, are exclusively the skins of female seals pregnant; these are all shot, and I have been informed that for every skin recovered five or six are lost through sinking when struck by the shot... "

Two paragraphs further down the Report proceeds (reading again) :

The Minister submits that the testimony produced by Mr. Hawkins in this connection is quite in accord with the information hitherto obtained, and is most valuable in support of the contention of Canada. It has been previously pointed out that although great stress had been placed by the United States' Government on the alleged necessity for prohibiting pelagic sealing in the Behring's Sea, yet no attempt had ever been made by that Government for an arrangement to curtail similar operations along the coast previous to the entry of seals into that sea.

In an attempt to vindicate the methods of the lessees of the seal islands, Mr. Hawkins proceeds : " We, on the other hand, during my experience have had annually large numbers of seal-skins from Alaska, and also from the Copper Islands, which are killed by being clubbed on land, and are selected with judgement, being the skins of young male seals : the older fighting or breeding males are spared. "

This is another presentation of the case of the United States' Government for the prohibiting of every other character of sealing but that adopted by the lessees, so frequently combated by your Excellency's advisers. While the Minister of Marine and Fisheries does not deem it necessary to dwell at any length upon the point, he would, in passing, invite attention to the fact that notwithstanding this statement, the United States' Treasury agents now assert the contrary, and the Government of the United States appear to be acting on the Reports of their Agents.

Omitting the next paragraph, I quote again :

The Minister submits that whatever significance Mr. Hawkins' statement may have upon the abstract question of the protection of seal life in the Pacific waters, it can have but little, if any, on the controversy between Great Britain and the United States, as the evil complained of, even if as great as alleged, occurs outside the disputed area, as he himself implies in his reference to the " north-west coast skins."

Therefore, it appears from this Canadian evidence that a danger, and a principal danger to the seals, lies outside Behring Sea, and in the North Pacific. Now, I read to the same effect passages from the Report of the British Commission which I have just referred to, page 22, section 138 (quoting) :

If certain months should be discussed as a close time for sealing at sea, it becomes important to inquire which part of the season is most injurious to seal life in proportion to the number of skins secured. and to this inquiry there can be but the one reply, that the most destructive part of the pelagic catch is that of the spring, during which time it includes a considerable proportion of gravid females, then commencing to travel on their way north to bring forth their young. It is on similar grounds and at corresponding seasons that protection is usually accorded to animals of any kind, and, apart from the fact that these seals are killed upon the high seas, the same arguments apply to this as to other cases.

That represents the most destructive part of the pelagic catch, to be in the spring, when gravid females are taken on their way north to the Islands. On page 23, section 145, the same Commissioners say :

From the foregoing review of the various facts and circumstances of seal life in the North Pacific, the following may be stated to be the governing conditions of proper protection and preservation :—

- (a.) The facts show that some such protection is eminently desirable, especially in view of further expansions of the sealing industry.
- (b.) The domestic protection heretofore given to the fur-seal on the breeding islands has at no time been wholly satisfactory, either in conception or in execution, and many of its methods have now become obsolete.
- (c.) Measures of protection to be effective must include both the summer and winter homes, and the whole migration-ranges of the fur-seal, and control every place and all methods where or by which seals are taken or destroyed.

Again, at section 155 and subdivision of that section, which is to be found on page 25 :

A close season to be provided, extending from the 15th September to the 1st May in each year, during which all killing of seals shall be prohibited, with the additional provision that no sealing-vessel shall enter Behring Sea before the 1st July in each year.

So that we see that not only is there no ground for an interpre-

tation of the Treaty limiting the Regulations to Behring Sea, but we have it fully recognized on the part of Great Britain that necessity requires such regulations in the North Pacific as well as in Behring Sea.

Having treated of the limitations sought to be imposed upon the Tribunal in respect to the contriving of Regulations for the preservation of the seals, I come to the real problem. What is the problem before this body? It is to contrive such Regulations as are *necessary for the preservation* of the fur-seals. Whatever is *necessary to that end* must be recommended, not matter what it is, or where it is operative, or what, otherwise, may be its effect? Whatever measures are *necessary* must be adopted. It is not to be supposed that all taking of seals is to be prohibited, for that would be to deprive mankind of the benefit of the animal. We must assume that the benefit is to be secured, and the taking be so regulated as to prevent extermination. Now the solution of that problem requires a study of the nature and habits of the animal, the methods by which it is pursued and captured, the perils to which it is exposed, and the means which may best be adopted to protect it against those perils. These are the things to be considered. But these are the very things which were taken into consideration in the inquiry into the question of property. It is the same question as the one I discussed in considering whether the United States had a property in the seals; and the conclusion was that it was necessary for the purpose of securing to mankind the benefit of the animal, and at the same time preserving the species, to award to the United States, which had a situation and a territory giving it a natural control over the animal, the benefits of the right of property. It is the same problem now; it is the same problem which human society has been engaged upon from the dawn of civilization to the present day. How can the benefit of animals useful to man be secured, without destroying the stock? That, I say, is a problem upon which society had been engaged for centuries, and the solution has, in every instance been, to award the rights of property to those who had such a control over the animals as enabled them to secure and supply for the uses of mankind the annual increase while at the same time preserving the stock. How else, can the problem be solved? How can you preserve to mankind a race of domestic animals, unless you award property to those who have such a control over them that they can destroy them? The United States have such a control over the fur-seal. He comes upon their soil; he remains there five or six months of the year; he subjects himself voluntarily to their power, so that they can destroy him at once. How can you preserve that race except by inducing the nation having this control, and this power of destruction to withhold

the exercise of that power. And how can you induce men to withhold the exercise of such a power except by awarding them the benefits of the right of property? If you will allow to them the reward of their abstinence; if you will induce them to exercise care, industry and self-denial, by assigning to those qualities their appropriate reward, then you can preserve the race. Otherwise, that preservation would be impossible. Therefore, I say that the problem of contriving Regulations is the same as that which arises in considering the question of property. But the question of property is deemed, for the purposes of our present argument to be decided adversely to the United States. That, however, does not change the nature of the problem at all. If the United States have no property right which will enable them to preserve the animal, you must have Regulations agreed on by all Governments. You must permit the United States to take the increase of the animal and prevent, by Regulations, all other nations from interfering with the animal at all. There is no other way. You must contrive Regulations which will bring about the same results as would flow from the institution of property.

Senator Morgan. Do you regard the words "protection" and "preservation" in the seventh Article of the Treaty as being strictly synonymous?

Mr. Carter. "Proper protection and preservation". I think those two words are, if not absolutely synonymous, very nearly so. They were employed in order to more fully to cover the notion that these seals were to be preserved by being protected.

We cannot, in this inquiry, lose sight for an instant of what the laws of nature are: they are the very object of our inquiry. These seals are subject to the operation of the laws of nature. Their increase and their decrease follow those laws with a rigid obedience; and in order to contrive measures which will insure the preservation of these animals we must study and ascertain these laws, and, having ascertained them, implicitly obey them. They cannot be tampered with. Any violation of them inevitably brings the consequences attached to such violation.

Now here, in my view, we reach what is really the end of legitimate debate upon this subject. Any further argument must proceed upon the assumption that there is some sort of doubt as to whether the pursuit of seals on the high seas by the methods of pelagic sealing is destructive or not. I have answered that question. There is not — there cannot be — any reasonable doubt of that. It is not possible to take females in the way and to the extent in which they are taken in pelagic sealing without bringing about the swift destruction of the species, even if all taking of seals on the land were prohibited. There are two things beyond

dispute : first, that the young and non-breeding males may be taken up to a certain point without diminishing the birth-rate; and, consequently, without diminishing the stock; and, secondly, that the taking of any female must diminish the birth-rate *pro tanto*. This conclusion does not depend upon scientific knowledge, but upon common information. Suppose that sheep could not be reared except in four places in the world, and that the entire demand of the world had to be satisfied by the product which could be obtained from those four places. Could any breeding ewe ever be properly killed under such circumstances? Why, very plainly, no! Every one must be preserved, and the demand would make it profitable to preserve every one of them, just as it is in the case of the seals. If you kill a single female seal you must inevitably diminish the product, not only by that one, but, in addition, by the number of young that that female would bring forth. Of course, as sheep can be produced everywhere and the market be glutted with them, it is perfectly proper to kill ewes when the production exceeds the demand. But this condition of things never occurs in the case of seals, for the demand is always out of proportion to the supply, being so large that there is an enormous profit on each seal.

Now, what is the attitude of the United States with reference to this matter of Regulations? Simply that it can propose no Regulation save one; and that is an absolute prohibition upon the killing of seals anywhere upon the seas, restricting the killing entirely to the Islands where the rate of increase can be ascertained, where the superfluous males can be taken and killed and thus devoted to the commerce of the world without diminishing the stock. Such a Regulation is necessary, absolutely necessary, in its entirety. If we were to propose any regulation at all which would permit pelagic sealing in any degree, it would be such a one as this — that pelagic sealing should be limited to the winter months, when sealers cannot put to sea on account of the stormy and boisterous weather, and when the seals cannot be found. Such a Regulation might be satisfactory enough. It would, theoretically, tolerate pelagic sealing, but it would, in reality, be a prohibition of the pursuit; and it is best to say at once that the prohibition should be made absolute, and that pelagic sealing should not be indulged in at all, in any form, at any time, under any circumstances.

We are, therefore, able to present no other scheme; but, perhaps, I ought, out of courtesy to the other side and to the British Commissioners, to consider what has been proposed. And I suppose we may say that if it is possible to retain pelagic sealing in any degree, without endangering the existence of the herd — these British Commissionners can find it out and present it. They

have made a profound study of the subject, and if the problem is capable of any solution which will preserve pelagic sealing at all, they must have found it out. And if they have discovered none, we may conclude that none is possible, and, therefore, I propose to see what their scheme is. I have cited it at page 201 of the Argument of the United States. It is as follows :

155. In view of the actual condition of seal life as it presents itself to us at the present time we believe that the requisite degree of protection would be afforded by the application of the following specific limitations at shore and at sea :

(a) The maximum number of seals to be taken on the Pribilof Islands to be fixed at 50,000.

(b) A zone of protected waters to be established, extending to a distance of 20 nautical miles from the islands.

(c) A close season to be provided, extending from the 15th September to the 1st May in each year, during which all killing of seals shall be prohibited, with the additional provision that no sealing vessel shall enter Behring Sea before the 1st July in each year.

156. Respecting the compensatory feature of such specific regulations, it is believed that a just scale of equivalency as between shore and sea sealing would be found, and a complete check established against any undue diminution of seals, by adopting the following as a unit of compensatory regulation :

For each decrease of 10,000 in the number fixed for killing on the islands, an increase of 10 nautical miles to be given to the width of protected waters about the islands. The minimum number to be fixed for killing on the islands to be 10,000, corresponding to a maximum width of protected waters of 60 nautical miles.

157. The above regulations represent measures at sea and ashore sufficiently equivalent for all practical purposes, and probably embody or provide for regulations as applied to sealing on the high seas as stringent as would be admitted by any maritime power, whether directly or only potentially interested.

There is the scheme. Its features are these : first, a limitation of the killing on the islands to 50,000 seals; second, a protected zone of 20 nautical miles around the islands at all times, with a provision for increasing that protection by an increase of 10 miles for every reduction of 10,000 which might be made in the number of seals killed on the islands. That is to say, if the number to be killed on the islands was reduced from 50,000 to 40,000 then the protected area would be 30 miles; if the number killed were reduced to 30,000, then the area would be 40 miles; if reduced to 20,000, then the area would be 50 miles; if reduced to 10,000 then the area would be extended to 60 miles in diameter; and if killing should be *absolutely prohibited* on the islands, you might have a protected area of 70 miles in diameter! The British Commissioners do not say that. They say the minimum limit of killing on the Islands should be 10,000; then they propose a close season extending from the 15th of September to the 1st

of May in each year, during which all killing of seals in Behring Sea or any where else shall be prohibited; and a prohibition against entering Behring Sea before the 1st of July.

Now, I have several observations to make on that scheme. The first is that it begins by a restriction of the killing of seals on the islands from 100,000 to 50,000. But that, these Arbitrators have no power to do. The regulations they are permitted to frame must be operative *outside* the jurisdictional limits of the two Governments. They have no authority to make any Regulation restricting the United States upon its own soil; that was never thought of by either of the Governments when they were engaged in framing the Treaty. But the Regulations require that we should cut down the number to be killed on the islands to 50,000. That being inadmissible, the whole thing is inadmissible. But let that pass, and let us consider this method upon its own merits as a scheme for the preservation of the seals, and assume that no objection is taken to the proposed reduction in the killing of seals upon the islands. How will the matter stand then? At present, there are at least 160,000 seals taken every year, probably more — 100,000 on the islands and 60,000 to 70,000 in pelagic sealing, besides what are lost. That, it is admitted, is ruinous. It is admitted that it involves the destruction, and probably the speedy destruction of the herd. The proposed limitation is supposed to prevent that destructive result, that is to say, it is supposed that it would inflict less destruction than would be effected by the taking of 100,000 young males on the Islands and 60,000 or 70,000, mostly females, upon the sea. Well, now, how many females can safely be taken without destroying the herd? That is the question : how many? Pelagic slaughter is levelled mainly at females; the great bulk of the pelagic catch is composed of females, as we know. How many can you safely take without destroying the herd? That is a problem to which these Commissioners have not given their attention, but that was the main thing for them to consider. They could not construct any effective scheme or regulation for the preservation of this herd without knowing how many females could be safely taken. But they have given us, in another part of their Report, a starting point upon which to operate. They have said, in Section 60 of their Report, which is to be found on page 11 :

From the circumstances above noted, the maintenance of seal life in the North Pacific was threatened and reduced to a critical state in consequence of the methods adopted on the breeding islands, where the seals were drawn upon annually to, and even beyond, the utmost limits possible apart from depletion, and where, in consequence of the enlarged season of commercial killing and the allowance of " food killing " during the entire time

in which any seals resorted to the islands, these animals had practically no undisturbed season of respite. At this time a new factor also tending towards decrease appeared in the form of "pelagic sealing."

That is to say, their position is that, prior to the introduction of pelagic sealing and when the herd was subject to no destruction, except such as proceeded from its natural enemies, and the killing upon the Islands, the killing of 100,000 non-breeding males was more than the herd could stand, and that that killing had brought the herd *into a critical condition*. Of course there is a point beyond which you cannot go in the taking of young males. You must leave enough for the purposes of reproduction. What is the limit? The Commissioners say that 100,000 is too many; the United States say that they do not think so. At the same time, it is conceded by the latter that you probably could not carry it much beyond that. Now take the British Commissioners' own view. If the herd cannot stand a draft of 100,000 young males, how many young females can safely be taken? Here you have a race of polygamous animals, one male being sufficient for twenty or thirty females. If the herd cannot stand the loss of 100,000 males, surely it cannot stand the annual loss of 20,000 or even 10,000 females. On the British Commissioners own hypothesis that must be true. Now, what assurance have we that, limiting the catch in this manner, there will not continue to be taken 20,000 and even 50,000 females? No restriction is placed on the sealing from the 1st of May to the 15th of September, except by the protected area around the islands, and the exclusion from Behring Sea until the 1st of July. How do you know that this scheme would not result in the taking of as many females as now? Why, it is certain it would result in that: I wish to call the attention of the learned Arbitrators to a provision of this scheme which makes it certain that, under it, the destruction, so far from being diminished, would be increased, because pelagic sealing would be immensely stimulated. One half of the supply now furnished by the Pribilof Islands is taken out of the market at once! What must be the effect of that? Why, of course, to vastly increase the price, and proportionally to add to the inducements to pelagic sealing. We know this would be the case, for it must be taken as certain that the force of pelagic sealers would have been largely increased at the price which skins commanded in 1890 when 60,000 or 70,000 skins were taken. We know that pelagic sealing would still continue to increase and rapidly increase, even though no further stimulus should be furnished in addition to what the present market price offers. It has been rapidly increasing all along. But what will be the effect when the supply from

the islands is cut down to the extent of 50,000? The world wants that 50,000, and will pay a great price for them. Under this scheme the pelagic sealers are offered the chance of furnishing them at a great profit. It is certain that the pelagic sealers will furnish it. They can do it with ease. All that is needed is to furnish the additional force of vessels and men; and this will be done because it will be highly profitable. The time allowed is abundantly sufficient if the requisite additional force is employed.

These regulations which begin by cutting down the supply of seals from the Pribilof Islands, which raise the price of sealskins in the market, and entice capital for the employment of more men at sea — these are provisions not for the *restriction*, but for the *encouragement* of pelagic sealing! That is their character upon the face of them: That is the object of this sliding scale which they propose for enlarging the area around the island. For every thousand of reduction in the number killed on the Islands, the Islands are to have an additional protection of ten miles. What does that amount to? That is still further reducing the supply which comes from the Pribilof Islands, and still further stimulating pelagic sealing. It makes the bulk of the whole supply of the market to depend upon pelagic sealing! The consequence would be not to diminish, but to greatly increase the slaughter of females.

Take another feature. Of course the taking at the Pribilof Islands is much less expensive than by pelagic sealing, and consequently the skins obtained there can be supplied to the world at a lower price. The greater the expense attached to the catching of the seal, the greater the price, if the market will bear it, which it will, as the demand exceeds the supply. These regulations will insure that pelagic sealing will be carried on, and the same or a greater number will be caught; but the expense is increased, and the consumer must pay that. You cannot increase the price of a commodity without increasing the outlay of the consumer.

Then, who is to carry out these Regulations? That must be done by armed cruisers. Must the United States furnish them. Nothing is suggested to the contrary. If Great Britain is to take her share of the expense, it would require a very considerable force of vessels. Not one, not two, but half a dozen at least must be sent there by one, or both, of the Governments for the purpose of enforcing these regulations; and it would cost not 100,000, but many hundreds of thousands of dollars — perhaps a million would be annually required to be expended under this scheme in order to enforce these prohibitions.

And their enforcement would be most difficult, because the pelagic sealer has a right to be upon the sea; the vessel has a right to be there, and it is the business of the Governments to keep

it out of this protected area. Conjecture only can inform us of the cost that is to be paid, not by the consumer, but by the Government; that is, by the people of the two powers, and of course the expense would have to be paid by taxation. Upwards of a million of dollars is to be expended, and for whose benefit? For the benefit of the United States? for the benefit of Great Britain? for the benefit of the consumers? No; for the benefit solely of the pelagic sealers; for the benefit of those engaged in pelagic sealing, and in order to enable them to carry on a destructive practice which will exterminate the seals in a few years! It seems to me that such a scheme is too preposterous for serious consideration.

I have said that these Commissioners have sedulously avoided the real problem before them, which was, to ascertain how many females can be taken without working the destruction of the herd. That is the sort of problem which has been solved upon the islands. The question there has always been, how many young males can you take without endangering the supply? They carry on the sealing on principles derived from very long experience, and they have come to the conclusion that you can take 100,000 young males, but you must not go beyond. A similar problem should have been solved by the Commissioners: how many females can be taken? If they had struggled with that question, the fallacy of their own solution would have been apparent. In the first place, they could not tell how many. Could they safely say that even five thousand females could be taken without endangering the destruction of the herd? They could not say that even 5,000 might be taken. From the evidence in the case, and as will be seen from the careful and accurate examination by the American Commissioners, it appears that 5,000 could not be taken. If you take 5,000 each year, that number must be annually subtracted from a constantly diminishing minuend, and the decrease progresses in a ratio far more rapid than the arithmetical one. The destruction at first might perhaps be small, but it would become greater and greater each year, until it reached a figure at which its swiftly, destructive effects became manifest. But suppose the Commissioners had concluded that 5,000, or 20,000, might be taken; they would have been confronted by another difficulty equally insuperable. How could they limit the captures to those figures? They could not limit the taking to males; there is no method in pelagic sealing of making any distinction. How could they tell when the cupidity of men was aroused by a large profit in the market, that there might not be 100 vessels upon the seas, and that not merely 60,000 females would be taken, but 100,000? That is perfectly possible, and far more probable than any different result.

One would suppose that in making these regulations they would have paid some attention to their own conclusions, as stated in other parts of their report. They have considered this question of taking females, for it had been pressed upon them. They have ventured to say, that the taking of females is not necessarily injurious; they may be barren, and then it is not injurious. That is true. It would not be any damage to take barren females; but who can tell what females are barren, and what are not? Nobody, except Elliott, whose report my learned friends very much wished to get in evidence. He knows! He can tell a barren female from others! He has recognized them on the Islands, and counted them. He says there were 250,000! But no other man can tell. These Commissioners were on the Islands. They could not tell how many barren females there were, or whether there were any. But I agree, if they could confine the taking to barren females, it would not do so much damage; but certainly it cannot be so confined, and they do not pretend to so confine it.

What is their own view of taking females that are not barren? They have expressed it thus, I read from section 80 of their report, which is on page 13 :

80. To assume that the killing of animals of the female sex is in itself reprehensible or inhuman, is to make an assumption affecting all cases where animals are preserved or domesticated by man. Most civilized nations, in accordance with the dictates of humanity as well as those of self-interest, make legislative provision for the protection of wild animals during the necessary periods of bringing forth and of rearing their young; but the killing of females is universally recognized as permissible if only to preserve the normal proportion of the sexes.

That is true, in cases where the animal can be cultivated in all parts of the globe at pleasure; but untrue where you can breed it only in a very few particular spots. [Continues reading-]

This is the case in all instances of game preservation and stock raising, and, in the particular example of the fur-seal, it is numerically demonstrable that, in maintaining a constant total of seals, a certain proportion of females should be annually available for killing. The killing of gravid females must, however, be deprecated as specifically injurious, and in any measures proposed for the regulation of seal hunting should receive special attention.

What attention have they given to it here? What provisions have they made or suggested for the protection of gravid females? None whatever; and of course none can be suggested. But why is the killing of a gravid female more specifically injurious than the killing of another female? I cannot myself perceive the differ-

ence. The two-year-old female of to-day is not gravid, but, if she is killed, the possibility of the existence of a gravid female is prevented. You only postpone the destruction by the period of a year. The absolute amount of the injury is almost the same, not exactly the same, but it is the same in nature, and almost the same in amount.

Now that we see what these regulations are, how are they to be described? What the Treaty requires are regulations *necessary for the preservation* of the fur-seal. Are *these* regulations for the preservation of the fur-seal? No; they are regulations designed to secure *the more speedy destruction* of that race. Their chief feature is to permit pelagic sealing, and to increase, and prodigiously increase, the stimulus which is offered for the pursuit. They are regulations, not for the protection and preservation of the fur-seal, but for its destruction — and for its destruction in the most inhuman and shocking form. And they come in the shape, as it were, of an *invitation* on the part of Great Britain to the United States to engage with her in this work of destruction. She asks her to abolish this mode of capture at present pursued upon the Islands, or to diminish it, to cut it down; to forego in great part that mode of taking the seals which is consistent with the preservation of the herd, and which is agreeable, as far as the killing of animals can be made agreeable, to the impulses of humanity. She asks her to forego that and engage with her in this destructive slaughter upon the seas. She is made to say to the United States: "Blot out from your statute-book those laws which declare the killing of female seals to be a crime; forget those precepts of the law of nature which teach us that the destruction of any useful race of animals is a crime; forget those precepts, and come and engage with us in this work of destruction upon the high seas! Come, together with us, and let us cut open the bellies of these gravid females, just ready to bring forth, and let their living and bleating young fall on the decks! Come with us, and slaughter these nursing mothers out at sea in search of food, and let their miserable offspring perish on the shore! Come with us, and let us make our decks run red and white with commingling streams of blood and milk!" Are these the *regulations* which a great and humane nation tenders to the United States as being those to which she is willing to yield her concurrence? Are these the *regulations* which the civilization and humanity of Europe, seated on that bench, are expected to approve?

Mr. President, I have said heretofore in the course of my argument — and I cannot too often insist upon it — that the duty of preserving this useful race of animals belongs to that nation, or to that people, which has such a control over them that they can take

and apply the annual increase and benefit of the animal to the uses of mankind without diminishing the stock. It is their duty, because they alone have the power to perform it, and because self-interest furnishes them with a sufficient motive to insure its performance. Nature has so linked together duty and self-interest as to make the gratification of the one assure the performance of the other.

The United States at one time believed that this was their duty, and they engaged in an effort to perform it. There are those who thought, and who still think, that that duty should never have been relinquished by the United States, but that she should have performed it at all hazards, even though she had been obliged to meet the "three quarters of the globe in arms. If she had engaged in its performance with the full exertion of all her power, and calamitous consequences had resulted, the humane sentiment of mankind — the public opinion of the world — history, in making her final award — would have charged all the responsibility for those calamities upon that nation which had refused to be bound by those natural laws which ought to be the rule governing the intercourse between nations.

But other counsels were followed; and a different course was pursued. The United States, abominating war, viewing hostilities with a power kindred in speech and blood with unutterable dread, always inclined to pacific measures, when a Tribunal was offered, made up from the selected wisdom of the world, for the determination of the rectitude of her contention against Great Britain, could not help accepting that offer, and forbearing from any further efforts of her own in enforcing her rights, and in discharging that corresponding duty to preserve this race of animals which had been imposed upon her by her situation and by her advantages. That duty she has relinquished; but, although the duty has been relinquished, it has not been extinguished. It has only been *transferred* from the United States to others. It has been transferred to the members of this Tribunal; and it remains for *them* to discharge this high duty of preserving from destruction a bounty of Providence designed to be a perpetual blessing to man. That duty is one which is perfectly easy to perform. The destruction of this race of seals is *wholly, absolutely, unnecessary*. It can be easily, certainly preserved, either by an award of property to the United States, or by the establishment of regulations tantamount to such an award of property, which shall prevent any slaughter of the species on the seas, and remit the entire taking to the Islands, where it can be carried on forever consistently with natural laws, as it has already been carried on for half a century.

If the decision of this Tribunal shall be in accordance with

those great laws which I have attempted to elucidate and to support, it will remain a guide, an instructive guide, for present and for future times in the adjustment of international controversies. If it shall be otherwise, it will be, of itself, a new source of strife and contention, and will add to the difficulties, already sufficiently great, which embarrass the intercourse of nations. Such is the responsibility of this high Tribunal, and I am not to doubt that it will be resolutely, faithfully, and effectively discharged.

The President. Mr. Carter, at the conclusion of this long and weighty argument, without presuming to express any opinion in reference to the merits of your case, I cannot refrain from expressing my acknowledgment of the lofty views which you have taken of the general principles involved in your subject, and which you have developed before us. You have spoken in a language well worthy of this high court of peace between nations. You have spoken for mankind.

Mr. Carter. I am very much obliged, Mr. President.

[The Tribunal adjourned until Wednesday, May 3, 1893, at 11.30 o'clock.]

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